130-340

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 220.

WILLIAM W. GIBBS, PLAINTIFF IN ERROR,

vs.

THE CONSOLIDATED GAS COMPANY OF BALTIMORE CITY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

FILED JANUARY 28, 1886.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, JULY 18, 1888.

1 THE UNITED STATES OF AMERICA, } *To wit:*
District of Maryland, }

At a circuit court of the United States for the fourth circuit in and for the district of Maryland, begun and held at the city of Baltimore, on the first Monday of April, being the sixth day of the same month, in the year of our Lord one thousand eight hundred and eighty-five—present, the Honorable Hugh L. Bond, circuit judge; Thomas J. Morris, judge Maryland district; Archibald Stirling, Jr., Esquire, attorney; John M. McClintock, Esquire, marshal; James W. Chew, clerk—among other were the following proceedings, to wit:

WILLIAM W. GIBBS
vs.
THE CONSOLIDATED GAS COMPANY OF BALTIMORE CITY.

Be it remembered that heretofore, to wit, on the 4th day of March, 1885, the said William W. Gibbs, by S. T. Wallis, Esquire, his attorney, came into court here and declared against The Consolidated Gas Company of Baltimore City in form following, to wit:

2 "*Declaration.*"

THE UNITED STATES OF AMERICA, } *To wit:*
District of Maryland, }

In the Circuit Court of the United States.

William W. Gibbs, a citizen of the State of Pennsylvania, by S. T. Wallis, his attorney, sues The Consolidated Gas Company of Baltimore City, a corporation duly incorporated under the laws of Maryland, for money payable by the defendant to the plaintiff—

1. For goods bargained and sold by the plaintiff to the defendant.
2. And for work done and materials provided by the plaintiff for the defendant at its request.
3. And for money lent by the plaintiff to the defendant.
4. And for money paid by the plaintiff for the defendant at its request.
5. And for money received by the defendant for the use of the plaintiff.
6. And for money found to be due from the defendant to the plaintiff on accounts stated between them.

And the plaintiff claims $60,000.

S. T. WALLIS,
Attorney for Plaintiff.

To the defendant:

3 Take notice that on the return day of the writ in this action a rule will be entered requiring you to plead to the above declaration before the -- day of ——, 188–.

S. T. WALLIS,
Plaintiff's Attorney.

Which said declaration is thus endorsed, to wit:
"Mr. Chew. Please docket the within case, by consent, as of the April term, 1885. S. T. Wallis, att'y for pl'ff; Morrison & Bond, att'ys for def't."

And thereupon the said defendant voluntarily appears in court here by Morrison & Bond, Esquires, its attorneys.

Rule Plea.

And thereupon, on motion of the said plaintiff, by his attorney aforesaid, it is ruled by the court here that the said defendant answer to the declaration in the plea aforesaid, or judgment of the court will be rendered against it by default.

4 And afterwards, to wit, on the 6th day of April, 1885, the said defendant, by its attorneys, filed its demand for a bill of particulars of the plaintiff's claim as follows, to wit:

Demand for Bill of Particulars.

In the U. S. Circuit Court for the District of Maryland.

W. W. GIBBS
vs.
THE CONSOLIDATED GAS COMPANY OF BALTIMORE CITY.

The defendant demands the particulars of the plaintiff's claim.
MORRISON & BOND,
Att'ys for Def't.

Endorsed: "Service of copy admitted April 6, 1885. S. T. Wallis, for pl'ff."

Plea Non-Assumpsit and Issue.

And afterwards, to wit, on the 7th day of April, 1885, the said defendant, by its said attorneys, comes and defends the force and injury when, &c., and says that it did not undertake or promise in manner and form as the said plaintiff hath above complained against it, and of this it puts itself upon the country, &c.; and the said plaintiff doth the like.

5 Afterwards, to wit, on the 13th of April, 1885, the said plaintiff, by his attorney aforesaid, filed in court here the following bill of particulars, to wit:

Bill of Particulars.

In the Circuit Court of the United States for the District of Maryland.

WILLIAM W. GIBBS
vs.
THE CONSOLIDATED GAS COMPANY OF BALTIMORE CITY.

Bill of particulars of plaintiff's claim.

The Consolidated Gas Co. of Balto. City to W. W. Gibbs, Dr.

For services rendered by me at your request in negotiating and consummating an arrangement and settlement of differences between the Consolidated Gas Co. of Balto. City and the Equitable Gas-Light Co. of Balto. City between July 1st, 1884, and Nov. 1st, 1884, $50,000.00.

Endorsed: "Service of copy admitted April 13th, 1885. Morrison & Bond, for def't."

6 *Verdict.*

Whereupon, for trying the issues aforesaid above joined between the parties aforesaid, it is ordered by the court that eighteen persons from the pannel of petit jurors drawn and summoned in pursuance of the act of Congress in such case — and provided be drawn by ballot according to law and practice of the court; and thereupon the eighteen persons being so drawn by ballot and written upon two lists, one of which said lists is delivered to the counsel of the respective parties, and said counsel having stricken out three persons from each of said lists, thereupon the remaining twelve persons, being called, come—that is to say, Edmund S. Alnut, John Warfield, John A. Jenness, Charles F. Mallory, Robert W. Chase, William H. Miller, Thomas S. Teppett, Lewis F. Bowen, James S. Hallowell, William H. Cathcart, Solomon King, and Jesse F. Higgins — who, being empanelled and sworn to say the truth in the premises, upon their oath, do say that the said defendant did not undertake and promise in manner and form as the said plaintiff hath above complained against him.

Judgment.

Therefore it is considered by the court here that the said plaintiff take nothing by his said writ, but that he be in mercy for his false complaint, and that the said defendant go thereof without day, &c.

7 It is also considered by the court here that the said defendant do recover against the said plaintiff the sum of twenty-six dollars and twenty-two cents for its costs and charges in this behalf sustained, and that the said defendant have thereof its execution.

MEMORANDUM.—Verdict and judgment for the defendant was rendered in the above case on the 14th day of May, 1885.

Agreement Extending Time to Present Bill of Exceptions and Order of Court Thereon. Filed 29th October, 1885.

Circuit Court of the U. S., April 7, 1885.

GIBBS *vs.* CONSOLIDATED GAS CO. OF BALTIMORE.

It is agreed between counsel that the court shall grant to the complainant time to present his bill of exceptions to the court for its allowance after the present term and until Dec. 1st, 1885.

Oct. 29, 1885.

S. T. WALLIS, *for Pl'ff.*
R. D. MORRISON, *for Def't.*

8 Ordered by the court, upon the above agreement of counsel, that plaintiff have leave to submit his bill of exceptions for allowance until Dec. 15th, 1885.

THOS. J. MORRIS.

Bill of Exceptions. Filed 31st October, 1885.

In the Circuit Court of the United States for the District of Maryland.

WILLIAM W. GIBBS
vs.
THE CONSOLIDATED GAS COMPANY OF BALTIMORE CITY.

Plaintiff's exception.

At the trial of this case, the incorporation of the defendant being admitted, the plaintiff, to maintain the issues upon his part joined, gave in evidence the agreement following between said defendant and The Equitable Gas-Light Company of Baltimore City, a Maryland corporation—that is to say:

Agreement.

9 This agreement, made this seventh day of October, eighteen hundred and eighty-four, between the Equitable Gas-Light Company of Baltimore City, a corporation duly organized under the laws of the State of Maryland, party of the first part, and the Consolidated Gas Company of Baltimore City, a corporation duly organized under the laws of the same State, party of the second part.

Whereas the parties hereto conduct the business of making and selling gas in the city of Baltimore, Maryland, and for some time past have been drawn into active competition, resulting in a loss of profits to each company, as well as large expenses and great annoyance;

And whereas each party hereto desires to enter into an arrangement with the other, whereby the business of each may be conducted in a more profitable manner than at present:

Now, therefore, in consideration of the premises and of the mutuality hereof, it is hereby agreed between said parties as follows, viz:

1. Gas shall be sold by each company at a rate of one dollar and seventy-five cents per thousand cubic feet, with a rebate of fifteen cents a thousand feet to consumers for payment within seven days from date of rendering bill, unless the rate shall be changed by mutual agreement of the parties hereto in writing; but in view of the much larger interest of the party of the second part in the subject-matter of this contract, it is agreed that in case of competition on the part of any other gas company the said party of the second part shall have the right at its discretion to reduce the rate at which gas shall be sold by either or both of the parties hereto, and shall have the right at its discretion to fix and change said price at which gas shall be sold by either or both of the parties hereto from time to time so long as such competition shall continue:

10

Provided, That said price shall not be placed at less than one dollar ($1.00) per thousand feet without the mutual consent of the parties hereto in writing. The introduction of gas from the street main to the inside of the building to be lighted will in all cases be done by the companies, for which the proprietor of the building or the person applying for the supply of gas will be required to pay in advance the sum of eight dollars ($8.00) to cover the expenses of tapping main, laying service pipe, setting meter, and its connection to the building line. An extra charge will be made where the building is set back from the building line.

2. Each party hereto shall deduct from its receipts and retain the sum of one dollar for every thousand feet of gas sold by it as a basis of cost to cover all expenses of the business of each.

3. All extensions of mains, including services and meters on said extensions, and all enlargement of the capacity of the works necessary to do the increasing business during the continuance of this agreement, shall be made by the Consolidated Gas Company of Baltimore City at its own cost and expense, whose property such enlargements and extensions shall be, the Equitable Company only being required to provide the meters and services necessary to supply such additional consumers as may be furnished by it under section 5, below:

11

4. Division of receipts shall be made as follows, viz:

1. All receipts (over and above the sum of one dollar per thousand feet allowed as a basis of cost) from gas sold each year upon sales not exceeding the total quantity of gas sold by both of said companies during the year ending October first, eighteen hundred and eighty-four, shall be divided between the parties hereto in the following proportions, viz: The party of the first part shall receive such a proportion of the same as the amount of gas sold by it during the year ending October first, eighteen hundred and eighty-four, shall bear to the total quantity of gas sold by both of the parties hereto during that period, provided the quantity sold by the party hereto of the first part during said period shall not exceed two hundred and thirteen millions of feet (213,000,000), and the party of the second part shall receive all the balance after deducting the amount

to which the party of the first part shall be entitled, as above provided, it being expressly understood and agreed that the basis of participation in said receipts shall be the proportion which the quantity of gas sold by each party from October first, eighteen hundred and eighty-three, to October first, eighteen hundred and eighty-four, bears to the total quantity of gas sold by both parties hereto, and that neither party hereto shall receive more thereof than by such a basis of division it would be entitled to, subject, however, to the foregoing provision that the quantity sold by the party of the
12 first part during the said year ending October first, eighteen hundred and eighty-four, shall not be considered as exceeding two hundred and thirteen millions (213,000,000) of feet as aforesaid.

2. All receipts (over and above the said allowance of one dollar per thousand feet as a basis of cost) from gas sold each year upon sales in excess of the said total quantity sold during the year ending October first, eighteen hundred and eighty-four, shall be divided as follows, viz: The party of the first part shall receive thereout a percentage equal to one-half of the percentage which it will receive as above, and the party of the second part shall receive all the balance of such receipts from said increased sales.

5. Neither party hereto shall solicit any business belonging to the other, but either party may take such consumers of the other as may voluntarily, without any solicitation, desire to change from one to the other.

6. All the accounts between the parties hereto hereunder shall be adjusted quarterly on the tenth days of February, May, August, and November of each year for the quarter ending on the last day of December, March, June, and September, and settlements of all balances shall be made within ten days thereafter. The said adjustment of accounts shall be made by an auditor, who shall be chosen by the agreement of both parties hereto.

7. If any differences or misunderstanding arise hereunder the matter in dispute shall be referred for decision to three arbiters, whose decision shall be binding upon the parties hereto, so
13 far as in law it may have binding force and effect. Said arbiter shall be chosen as follows, viz:

One shall be chosen by each party hereto and the third by the two so chosen: Provided, That if either party hereto neglects or refuses for ten days after request, in writing, mailed or personally delivered, to appoint an arbiter, the party making such request shall appoint two arbiters, who shall appoint a third, as above provided.

8. It is further understood and agreed that if either party hereto shall at any time wilfully fail, omit, or neglect to perform or shall violate any of the covenants herein contained, such party shall be liable to the other for all loss and damage caused to or suffered by it thereby, and that the damages which shall be caused thereby will be equal to the sum of two hundred and fifty thousand dollars ($250,000), and that the party who shall so fail, neglect, or omit to perform or who shall violate any of the covenants herein contained shall at once thereupon pay to the other party the sum of two hun-

dred and fifty thousand dollars as liquidated damages, and that upon failure to pay the same upon demand suit may be brought therefor, in which the damages so caused or suffered shall be assessed at said sum of two hundred and fifty thousand dollars.

9. This agreement shall take effect from October fifteenth, eighteen hundred and eighty-four, and shall continue in force for thirty years from its date.

In witness whereof the said parties have hereto affixed their
14 corporate seals, duly attested, and have caused these presents to be signed, in duplicate, by their respective presidents this seventh day of October, eighteen hundred and eighty-four.

[Seal of Equitable Company.]

(Signed) GEORGE J. FORREST,
President of the Equitable Gas-Light Company of Baltimore City.

[Seal of Consolidated Company.]

(Signed) JOHN W. HALL,
President of the Consolidated Gas Company of Baltimore City.

Signed, sealed, and delivered in the presence of—
(Signed) MELVILLE C. DAY.
(Signed) R. D. MORRISON.

15 The plaintiff then proved the incorporation of the United Gas Improvement Company, a corporation incorporated by and doing business in the State of Pennsylvania.

The plaintiff further proved that at the time of the agreement aforesaid he was the general manager of the said United Gas Improvement Company, and the business of the said corporation was the owning, improving, leasing, and manipulation of gas property throughout the country, said company being the owner of many gas works in various parts of the Union, and constantly in negotiation for the sale and purchase of that kind of property.

He further proved that by reason of the rivalry in the city of Baltimore between the defendant and the Equitable Gas-Light Company aforesaid the price of gas had been reduced to a figure below that at which it could be profitably manufactured, and that the company of which the plaintiff was manager, as well as other gas companies throughout the country, had been materially inconvenienced by the fact that they were required and expected by their customers to sell their gas at the insufficient price at which it was furnished in Baltimore. It became, therefore, the interest of the plaintiff and his company that the conflict in Baltimore should, if possible, be brought to an amicable termination, and the plaintiff made a suggestion to that effect to the president of the Equitable Gas-Light Company, and in consequence thereof was employed by that company to bring about a settlement, if possible, with the defendant. For this purpose the plaintiff visited Baltimore and opened negotiations
16 with the defendant, which were carried on for some time by

proposition and counter-proposition, and resulted, finally, in the agreement heretofore inserted in this bill of exceptions.

The plaintiff gave further evidence tending to show that early in those negotiations he informed the defendant, through the committee representing it, that he was employed and would be paid by the Equitable Gas-Light Company if he made an arrangement satisfactory to that company, and that if he should be successful in bringing about a settlement satisfactory to the defendant also he should expect and claim to be compensated by the defendant likewise.

Further testimony in respect to the matter of his said negotiations and services and his claimed and expected compensation from the defendant was given by the plaintiff tending to support and establish the hypotheses of fact set up by the plaintiff in those regards in his prayers hereinafter to be inserted.

The defendant then, to maintain the issues upon its part joined, gave in evidence the acts of the General Assembly of Maryland of 1867, chap. 132, and of 1882, chap. 337, both relating to the Equitable Gas-Light Company of Baltimore City, which it was agreed might be read in evidence, if necessary, from the statute book on the hearing in error.

The defendant further gave evidence tending to contradict the evidence on the part of the plaintiff in regard to what occurred
17 between the plaintiff and the defendant's committee in respect to the negotiations aforementioned and to the plaintiff's alleged demand for compensation from the defendant, and tending to disprove the facts assumed as the hypotheses of the plaintiff's prayers; and the defendant further gave evidence tending to establish and maintain the hypotheses of fact set up by the defendant in its prayers to the court, hereinafter to be inserted.

And thereupon the defendant offered to the court the following prayers:

Defendant's Prayers.

(Granted.) 1.

The defendant, by its counsel, prays the court to instruct the jury that the plaintiff, upon the pleadings and evidence in this cause, is not entitled to recover, because the contract offered in evidence, and for the procuring of the making whereof he claims compensation in this suit, was illegal and void.

(Rejected.) 2.

The defendant, by its counsel, prays the court to instruct the jury that the plaintiff, upon the pleadings and evidence in this cause, is not entitled to recover, because the only services claimed or proved to have been rendered by the plaintiff to the defendant were in procuring and inducing the Equitable Gas-Light Company to combine and contract with the defendant, which it was and is unlawful for said Equitable Company to do.

18 (Rejected.) 3.

The defendant prays the court to instruct the jury that the plaintiff is not entitled to recover upon the pleadings and evidence in this cause, because it appears therefrom that during the years 1882, 1883, and 1884 the defendant company and the Equitable Gas-Light Company had opposed and divergent interests and were engaged in a contest for the business of supplying gas in the city of Baltimore, and that during the year 1884 the plaintiff was employed by the Equitable Gas-Light Company as its agent to settle such contest upon certain terms, and in pursuance of such employment did carry on negotiations between the two companies, which resulted in a settlement of such contest, and that the sole claim of the plaintiff alleged or proved in this cause is for his labor and services in conducting said negotiations.

(Rejected.) 4.

The defendant prays the court to instruct the jury that if they find from the evidence that the defendant company and the Equitable Gas-Light Company, during the years 1882, 1883, and 1884, had opposed and divergent interests, resulting in a contest between them for the business of furnishing illuminating gas in the city of Baltimore, and that during the year 1884 the plaintiff was employed by the Equitable Gas-Light Company as its agent to reconcile and settle the contest for a valuable consideration to be paid him, and if they shall further find that after and during the continuance of
19 such employment and in pursuance thereof the plaintiff came to Baltimore and did carry on negotiations between the two companies, which resulted in a settlement of the contest between them, then the plaintiff is not entitled to recover from the defendant any compensation for his services in bringing about such settlement, unless the jury shall further find that the plaintiff fully disclosed his employment by the Equitable Gas-Light Company to the defendant, and the defendant, with full knowledge of such employment, expressly promised to pay him for such services, and there is no evidence in this cause from which the jury can find such express promise.

(Rejected.) 5.

The defendant prays the court to instruct the jury that if they find from the evidence that the defendant company and the Equitable Gas-Light Company, during the years 1882, 1883, and 1884, had opposed and divergent interests, resulting in a contest between them for the business of supplying illuminating gas in the city of Baltimore, and that during the year 1884 the plaintiff was employed by the Equitable Gas-Light Company as its agent to settle the contest, and if they shall further find that in pursuance of such employment the plaintiff came to Baltimore and presented himself to the defendant as the agent of a certain other company called the United Gas Improvement Company, and stated that he desired to

settle the contest because of certain benefits which would
20 thence accrue to said last-mentioned company, then the plaintiff is not entitled to recover from the defendant compensation for his services in settling said contest, although the jury shall find that subsequently and during the pending of the negotiations resulting in such settlement the plaintiff disclosed his true character to the defendant and notified it that he would claim compensation from it also.

(Rejected.) 6.

The defendant prays the court to instruct the jury that if they find from the evidence that the defendant company and the Equitable Gas-Light Company, during the years 1882, 1883, and 1884, had opposed and divergent interests, resulting in a contest between them for the business of furnishing illuminating gas in the city of Baltimore, and that during the year 1884 the plaintiff was employed by the Equitable Gas-Light Company as its agent to reconcile and settle the contest for a valuable consideration to be paid him, and if they shall further find that after and during the continuance of such employment and in pursuance thereof the plaintiff came to Baltimore and did carry on negotiations between the two companies which resulted in a settlement of the contest between them, then the plaintiff is not entitled to recover from the defendant any compensation for his services in bringing about such settlement, unless the
21 jury shall further find that the plaintiff fully disclosed his employment by the Equitable Gas-Light Company to the defendant, and the defendant, with full knowledge of such employment, expressly promised to pay him for such services.

(Rejected.) 7.

The defendant prays the court to instruct the jury that if they find from the evidence that the defendant company and the Equitable Gas-Light Company had, during the years 1882, 1883, and 1884, opposed and divergent interests, resulting in a contest between them for the business of supplying illuminating gas in the city of Baltimore, and that during the year 1884 the plaintiff was employed by the Equitable Gas-Light Company to settle such contest as its agent, and if they shall further find that in pursuance of such employment the plaintiff came to Baltimore and presented himself to the defendant as a person authorized by said Equitable Gas-Light Company to arrange a settlement of the contest upon certain terms, and that thereupon negotiations were carried on by the plaintiff which resulted in a settlement of the contest, and that during the pendency of such negotiations the plaintiff informed the defendant that he was to receive compensation from the Equitable Gas-Light Company, and stated that he should expect compensation from the defendant also, and that he was thereupon informed by the defendant that it denied his right to claim any compensation
22 from it, he being the agent of the other company and not being in the employ of the defendant, then the plaintiff is not

entitled to recover any compensation from the defendant for his labor in bringing about such settlement of said contest between the two companies, although they shall find that the plaintiff thereafter continued such labor with the knowledge and without objection of the defendant.

(Rejected.) 8.

If the jury shall find from the evidence that the defendant not only did not employ the plaintiff, but refused to employ him to carry on for it or in its behalf the negotiations given in evidence, and if they shall find that the plaintiff informed the defendant's committee that he was to be paid by the Equitable Gas-Light Company if the negotiations should result successfully, and asked the committee what they would be willing to give him, and if the jury shall find that thereupon the said committee, in plain and unmistakable terms, informed the plaintiff that — would not agree to pay him anything whatever, but that it must be left to them when the matter should be completed whether they would give him anything or not, and that if they should conclude to give him anything at all it would be as gratuity, and that they would not recognize any obligation to give him anything, then these facts give rise to no claim on the
23 part of the plaintiff and no obligation on the part of the defendant, and their verdict must be for the defendant, even though they shall find that after the happening of said facts the plaintiff, with the knowledge of the defendant, continued to negotiate with the other company, and that by reason of such negotiations the contract offered in evidence was consummated.

And the plaintiff upon his part offered to the court the prayers following—that is to say:

Plaintiff's Prayers.

(Rejected.) 1.

Even if the jury shall find, from the evidence, that the defendant not only did not employ the plaintiff, but refused to employ him to carry on for it or on its behalf the negotiations given in evidence, yet if they shall find that the defendant, knowing that the plaintiff claimed and expected compensation from it therefor, continued to negotiate with the other company through him and not otherwise, and accepted his services in such negotiation, and finally procured through him the consummation of the said agreement, and that the same was to it of great value and importance, then the plaintiff is entitled to recover what the jury shall find to be a fair compensation for his said services in the premises.

24 (Rejected.) 2.

Even if the jury shall find, from the evidence, that the defendant not only did not employ the plaintiff, but refused to employ him to carry on for it or on its behalf the negotiations which have been

testified to, yet if the committee of the defendant at the same time, knowing that the plaintiff claimed and expected compensation from it, said to him that if he would leave it to the said committee and should be successful in bringing about, with the Equitable Gas-Light Company, an arrangement satisfactory to the defendant, he would be in good hands, or the said committee would deal fairly with him, or words to that effect, and if the jury shall further find that plaintiff accordingly did go on with his negotiations, and was successful in making an arrangement not only satisfactory, but greatly advantageous to the defendant, then the plaintiff is entitled to recover in this action what the jury shall find to be a fair compensation for his services.

(Rejected.) 3.

If the jury shall find for the plaintiff, they will be entitled to consider and should consider, in estimating the amount of the plaintiff's compensation, not merely the time and labor occupied in the negotiations which have been proven, but the success with which they were conducted and the value to the defendant of the settlement in which those negotiations resulted.

Whereupon the court granted the first prayer of the defendant and rejected the prayers of the plaintiff, as well as the other prayers of the defendant, the court considering and so ruling that as the plaintiff, by reason of the granting of the first prayer of the defendant, had no standing in court, the consideration of the questions raised by the other prayers, on both sides, was unnecessary and irrelevant.

The plaintiff thereupon excepted to the ruling of the court in rejecting the prayers of the plaintiff and in granting the first prayer of the defendant, and prayed the court to sign and seal this his bill of exceptions, which is accordingly done this April term, 1885.

THOS. J. MORRIS, *Judge.* [SEAL.]

This bill of exceptions is agreed to.
Nov. 25th, 1885.

S. T. WALLIS, *For Pl'ff.*
MORRISON & BOND, *For Def't.*

Prayer for Writ of Error. Filed 27th November, 1885.

In the U. S. Circuit Court for the District of Maryland.

WILLIAM W. GIBBS
vs.
THE CONSOLIDATED GAS COMPANY OF BALTIMORE CITY.

The plaintiff in the above-entitled cause prays the court for a writ of error to the Supreme Court of the United States.

S. T. WALLIS,
Att'y for Pl'ff.

Let the writ of error issue upon the plaintiff giving bond for costs in the sum of three hundred dollars.

THOS. J. MORRIS, *Judge.*

Thereupon the said plaintiff, by his attorney aforesaid, produced the writ of the United States of America for the correcting of errors of and upon the premises, commanding that the judgment aforesaid so as aforesaid rendered, with all things thereunto relating, be transmitted to the Supreme Court of the United States to be held at Washington on the second Monday of October next. The tenor of writ is as follows, to wit:

Writ of Error.

27 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Maryland, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between William W. Gibbs, plaintiff, and The Consolidated Gas Company of Baltimore City, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 30th day of November, in the year of our Lord one thousand eight hundred and eighty-five.

[The Seal of the Circuit Court, Maryland.]

JAS. W. CHEW,
Clerk of the Supreme Court of the United States.

Allowed by—
JUDGE THOMAS J. MORRIS.

28 [Endorsed:] (7.) Wm. W. Gibbs *vs.* The Consolidated Gas Company of Baltimore City. Writ of error.

29 *Writ of Error Bond. Filed 4th December*, 1885.

Know all men by these presents that we, William W. Gibbs, of Philadelphia, Pa., and David L. Bartlett, of the city of Baltimore, are held and firmly bound unto the Consolidated Gas Company of

Baltimore City in the sum of three hundred dollars, current money, to be paid unto the Consolidated Gas Company of Baltimore City, its certain attorney, successors, or assigns; to the payment of which, well and truly to be made and done, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this second day of December, in the year of our Lord one thousand eight hundred and eighty-five.

Whereas lately, in the circuit court of the United States for the fourth circuit in and for the district of Maryland, in a cause in said court wherein the said William W. Gibbs was plaintiff and The Consolidated Gas Company of Baltimore City was defendant, a judgment was rendered against the said plaintiff, from which said judgment the said plaintiff has sued out a writ of error to the next Supreme Court of the United States to be held at the city of Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said William W. Gibbs shall cause a transcript of the record and
30 proceedings of the said circuit court in said cause to be transmitted to the said Supreme Court within the time appointed by law and shall prosecute his said appeal with effect and pay all costs that may be adjudged against him by the said Supreme Court in case he shall fail to make good his said plea, then this obligation shall be void; otherwise to be and remain in full force and virtue.

WILLIAM W. GIBBS. [SEAL.]
D. S. BARTLETT. [SEAL.]

Signed, sealed, and delivered in the presence of—
JAMES BALL,
As to W. W. Gibbs.
A. B. W. DEW,
As to D. L. Bartlett.

Bond approved.

THOS. J. MORRIS, *Judge.*

31 THE UNITED STATES OF AMERICA, *District of Maryland,* } *To wit:*

To the Consolidated Gas Company of Baltimore City, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the circuit court of the United States for the fourth circuit in and for the district of Maryland, wherein William W. Gibbs is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said William W. Gibbs in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in this behalf.

Witness my hand and seal on this 4th day of December, A. D. 1885.

[The Seal of the Circuit Court, Maryland.]

THOS. J. MORRIS, *Judge.* [SEAL.]

Service of citation admitted this 8th day of December, 1885.

MORRISON & BOND,
Att'ys for Con. Gas Co.

[Endorsed:] (9.) Wm. W. Gibbs *vs.* Consolidated Gas Company. Citation. Serve on Morrison & B. Original goes in.

32 In pursuance whereof and according to the statute in such case made and provided, a record of the judgment aforesaid, with all things thereunto relating, together with the said writ of error annexed, is hereby transmitted to the said Supreme Court accordingly.

UNITED STATES OF AMERICA, *District of Maryland,* } *To wit:*

I hereby certify that the foregoing is a full and true record of the proceedings of the circuit court of the United States for the fourth circuit in and for the district of Maryland, in the said entitled cause.

In testimony whereof I hereto set my hand and affix the seal of the said circuit court on this 24th day of December, A. D. 1885.

[The Seal of the Circuit Court, Maryland.]

JAS. W. CHEW,
Clerk of said Circuit Court.

Endorsed on cover: Maryland C. C. U. S. No. 220. William W. Gibbs, plaintiff in error, *vs.* The Consolidated Gas Company of Baltimore City. Filed January 28, 1886.

Supreme Court of the U. S.

October Term, 1888.

No. 220.

WILLIAM W. GIBBS, PLAINTIFF IN ERROR,

vs.

THE CONSOLIDATED GAS COMPANY OF BALTIMORE CITY, DEFENDANT IN ERROR.

In Error to the Circuit Court of the United States for the District of Maryland.

BRIEF OF PLAINTIFF IN ERROR.

S. T. WALLIS,
For Plaintiff in Error.

JOHN MURPHY & CO., PRINTERS AND STATIONERS, BALTIMORE.

Supreme Court of the U. S.

October Term, 1888.

No. 220.

WILLIAM W. GIBBS, PLAINTIFF IN ERROR,

vs.

THE CONSOLIDATED GAS COMPANY OF BALTIMORE CITY, DEFENDANT IN ERROR.

In Error to the Circuit Court of the United States for the District of Maryland.

BRIEF OF PLAINTIFF IN ERROR.

This suit was instituted by the Plaintiff in Error to recover from the Defendant compensation for services rendered the Defendant, at its request, in negotiating and consummating an arrangement and settlement of differences between The Consolidated Gas Company of Baltimore City and The Equitable Gas Light Company of Baltimore County, between July 1st and November 1st, 1884.

The action was in the ordinary form of *indebitatus assumpsit* under the practice of Maryland. There was a demand for a

bill of particulars, which last was filed and will be found on page 3 of the record, in the terms just above stated. The plea was *non-assumpsit* and the verdict of the jury, under the instruction of the Court, was for the Defendant, and judgment was rendered, accordingly, on May 14, 1885.

At the trial of the case, Plaintiff gave in evidence the agreement which he claims to have negotiated between the two Gas Light Companies above mentioned, and which will be found on pages 4 to 7 of the record. He further proved (pages 7 and 8 of the record) that at the time when said agreement was negotiated, he was the general manager of the United Gas Improvement Company, a Pennsylvania corporation, and that the business of said corporation was the owning, improving, leasing and manipulation of gas property throughout the country; said Company being the owner of many gas works in various parts of the Union, and constantly in negotiation for the sale and purchase of that kind of property. He further proved that by reason of the rivalry, in the City of Baltimore, between the Defendant in Error and the Equitable Gas Light Company, the price of gas had been reduced to a figure below that at which it could be profitably manufactured, and that the United Gas Improvement Company, of which he was manager, as well as other Gas Companies throughout the country, had been materially inconvenienced, by the fact that they were required and expected by their customers to sell their gas at the insufficient price at which it was furnished in Baltimore. It became, therefore, the interest of the Plaintiff and his Company that the conflict in Baltimore should, if possible, be brought to an amicable termination. Plaintiff accordingly made a suggestion to that effect to the President of the Equitable Gas Light Company, which, in consequence, employed him to bring about a settlement, if possible, between that Company and the Defendant in Error. For this purpose the Plaintiff visited Baltimore and

opened negotiations with the Defendant, which were carried on, for some time, by proposition and counter proposition, and resulted finally in the agreement between the two Companies hereinbefore referred to. The Plaintiff further gave evidence tending to show that early in those negotiations he informed the Defendant, through the Committee which represented it, that he was employed and would be paid by the Equitable Gas Light Company, if he made an arrangement satisfactory to that Company, and that if he should be successful in bringing about a settlement satisfactory to the Defendant also, he should expect and claim to be compensated by the Defendant likewise. Further testimony in respect to the matter of his said negotiations and services and of the compensation which he claimed and expected from the Defendant, was given by the Plaintiff tending to support and establish the hypotheses of fact, upon which he based the prayers which he presented to the Court.

The Defendant on its part gave evidence to contradict the Plaintiff's proof of what had occurred between the Plaintiff and Defendant's Committee, in respect to the negotiations in question and to the Plaintiff's alleged demand for compensation from the Defendant, and tending to disprove the facts assumed as the hypotheses of Plaintiff's prayers. (Rec., p. 8.) The Defendant further gave evidence tending to establish and maintain the hypotheses of fact set up in the prayers presented on its part to the Court. In order to avoid encumbering the record and troubling the Court with the details of the evidence, these are not given in the bill of exceptions, and the case is, therefore, before the Court upon the admission on both sides, that there was sufficient basis of fact for all the prayers presented, to raise the questions of law which they were intended to submit. The Defendant further gave in evidence the Acts of the General Assembly of Maryland of 1867, Chapter 132, and 1882, Chapter 337, being

the charter and amended charter of the Equitable Gas Light Company of Baltimore City, which it was agreed might be read, if necessary, from the Statute Book, on the hearing in error.

The Plaintiff presented three prayers, which will be found on pages 11 and 12 of the record, and all of which were rejected. The Defendant presented eight prayers (pages 8 to 11 of the record), all of which were rejected except the first. As will be seen by the statement on page 12, in connection with the three rejected prayers of the Plaintiff, the Court declined to consider the questions raised by any of the prayers on either side, except the first prayer of the Defendant. It held that the Plaintiff, by reason of the granting of the first prayer of the Defendant, had no standing in Court, and that the consideration of the points presented by the other prayers, on both sides, was unnecessary and irrelevant. Nothing, therefore, is directly before the Court, for its consideration here, except the propriety of granting the Defendant's first prayer. If the Court was right in that instruction, the case is and was at an end; if the Court was wrong, the Plaintiff will ask leave to bring to the consideration of this Court the propriety of the rejection of his prayers.

The first prayer of the Defendant (page 8 of the record) is in these words:

"The Defendant, by its counsel, prays the Court to instruct the jury that the Plaintiff, upon the pleadings and evidence in this cause, is not entitled to recover, because the contract offered in evidence, for the procuring ~~and~~ of the making whereof he claims compensation in this suit, was illegal and void."

The Defendant's second prayer (page 8 of the record) prayed the Court to instruct the jury "that the Plaintiff, upon the pleadings and evidence in the cause, is not entitled to recover, because *the only services* claimed or proved to have been rendered by the Plaintiff to the Defendant were *in procuring and inducing the*

Equitable Gas Light Company to combine and contract with the Defendant, which it was, and is, unlawful for the said Equitable Company to do."

The third prayer of the Defendant (page 9 of the record) appears to have been intended as a deduction from the first and second, and can only be maintained on the ground that the legal proposition set up in each or either of those prayers, is law, as the Defendant asserts it to be. None of the other prayers of the Defendant request the Court to take away the case from the jury, and whether they were properly or improperly rejected is a matter which can have no bearing upon the question of affirming or reversing the judgment below. Of course, if the Court should hold that the Circuit Court erred in its ruling and that the case must be sent back, the Plaintiff would respectfully ask their Honors to determine whether his prayers were properly or improperly rejected, and otherwise to pass on the law of the case, for the guidance of the Court below on a re-hearing.

The ground upon which the Circuit Court rested in granting the Defendant's first prayer, was that of public policy. It appeared to the learned District Judge, who tried the case, that the provisions of the agreement, for the negotiation of which the Plaintiff in error claims compensation, were against the interest of the public in putting an end to competition between the two Gas Companies and enabling them, as between themselves, or in case of competition on the part of any other Gas Company, to regulate the price of gas at which either, or both of them, should sell to consumers, and that the tendency of the whole arrangement was to promote monopoly, and was in the nature of a combination by producers against consumers.

The second prayer of Defendant does not assert illegality on public grounds in the contract itself or on the part of the Defendant in Error, but relies, exclusively, upon the alleged unlaw-

fulness of the Defendant's procuring and inducing the Equitable Gas Light Company to combine and contract with the Defendant in Error, which it alleges that it was unlawful for the Equitable Company to do. If the Defendant was right in this prayer, and if the Circuit Court ought to have granted it and to have thus put the Plaintiff out of court, without the intervention of the jury, this Court, it is presumed, will not send the case back, even if it should find that the Court below erred in granting the first prayer.

Assignment of Errors.

The Plaintiff in Error, therefore, assigns as error, in the rulings of the Court below,

First. That it instructed the jury that the contract in the negotiation of which the Plaintiff took part, was illegal and void, and consequently could not be the foundation of a recovery in the action; and

Second. That it refused to grant the three prayers, and each of them, submitted on the Plaintiff's behalf.

The Plaintiff in Error would respectfully ask the Court to hold that the contract is not one which is void upon its face, or otherwise shown to be void, and that it contains no such elements of invalidity as will entitle the Defendant in Error, after having availed itself of the Plaintiff's services in its negotiation and secured to itself large gains and advantages from his intervention, to refuse him what a jury might consider to be a just compensation for his labors.

The grounds upon which error is alleged in the rejection of the Plaintiff's own prayers, he will, for convenience, ask leave to consider, further on in this brief, in discussing his rights if the case should be remanded.

Competition.

The agreement (page 4 of the record) recites, as matter of fact, that the parties thereto, being engaged in the business of making and selling gas in Baltimore, had for some time past been drawn into active competition with each other, "resulting in a loss of profits to each Company, as well as large expenses and great annoyance." Of the truth of this statement there is not only no denial or dispute in the evidence, but the further fact is affirmatively proved on the part of the Plaintiff (page 7 of the record) as already has been stated, that by reason of the rivalry between the two Companies, the price of gas had been reduced to a figure below that at which it could be profitably manufactured. This, therefore, may be taken as a concession in the case. It can hardly be contended, admitting this to be true, that there could be any impropriety in an agreement, between the rival parties, to desist from an antagonism which was ruinous to both of them, and which could only end, in the long run, in the destruction of the Company which was financially the weaker. The obvious result would necessarily have been to give to the stronger and surviving Company an entire monopoly of the business in which both of them were engaged. That such a result would have been inevitable, if the strife had continued, and that it would have placed the community at the mercy of the Corporation which remained master of the field, there can be no doubt. Looking, therefore, at the interest of the public, it would seem to be clear that an arrangement, by which such a result should be prevented, would be quite as advantageous in the end, to the consumer, as it was natural and reasonable upon the part of the manufacturing Companies. Unless, therefore, there is something in the agreement which goes beyond this and secures, or provides for securing, undue and unlawful advantages to the Com-

panies over the public, it is not perceived that the settlement of their differences was a thing which could in any way be repugnant to sound public policy. Although it is true, in a certain sense, the experience of later days has certainly demonstrated the falsehood, as a general proposition, of the hackneyed maxim, that "competition is the life of trade." It is largely the lesson of modern times, and emphatically so, in this country, that extreme competition not only promotes inferiority in manufacture and service, but conduces largely to mercantile and business disaster, and reacts upon the community in the shape of a return to higher prices, and a more absolute control over the consumer by the successful few. No lawyer, no intelligent business man, can be blind to the fact, which is constantly brought to the official notice of the Courts themselves, in cases of bankruptcy and insolvency, that the necessity of doing business upon the smallest margin of profit, with the alternative of being able otherwise to do none, is one of the most fruitful sources of calamity, the moment that a financial pressure occurs. What the interest of trade as well as the public requires—the interest of the laborer as well as the capitalist and the consumer—is fair and reasonable competition, with reasonable and stable profits justifying investment and compensating toil. Those who are familiar with economic discussions are well aware how universally this conclusion is adopted by approved thinkers and writers. And such also is the doctrine of the Courts.

"I do not think that competition is invariably a public benefaction, [says Mr. Justice Gray, speaking for the Court of Appeals of New York in Leslie *vs.* Lorillard, 110 N. Y., 519, 532, 533, 534] for it may be carried on to such a degree as to become a general evil."

"I apprehend"—says Howe, J., in Kellogg *vs.* Larkin, 3 Chandler (Wisc.), 133, 159—"it is not true that competition is the

life of trade. On the contrary, that maxim is one of the least reliable of the host that may be picked up in every market place. . . . It is hardly entitled to take rank as an axiom in the jurisprudence of this country. . . . I believe universal observation will attest that for the last quarter of a century competition in trade has caused more individual distress, if not more public injury, than the want of competition."

"It has been said by the learned counsel for the plaintiff" (said Judge Story, fifty years ago) "that free competion is best for the public. . . . Men may reasonably differ with each other on that point." Jencks *vs.* Coleman, 2 Sumner, 227.

And see Central Slade Roller Co. *vs.* Cushman, 143 Mass., 353, 362, 363; Palmer *vs.* Stebbins, 3 Pick., 188; 1 Wood, R. Road Law, 600.

Details of the Agreement.

Article 1st of the agreement provides that gas shall be sold by each Company at the rate of $1.75 per thousand cubic feet, with a rebate of 15 cents per thousand for prompt payment ($1.60 net), unless such rate shall be changed by mutual agreement of the parties in writing. The Defendant in Error, by reason of its having, as the contract states, a much larger interest than the Equitable Company in the subject matter of the contract, is allowed, in its discretion, in case of competition on the part of any other Gas Company, to reduce, fix and change the rate at which gas shall be sold by either or both of the parties, from time to time, so long as such competition shall continue. It is provided, however, that the price shall not be placed at less than $1 per thousand feet, without the consent of both parties in writing. By Article 3d (Rec. p. 5), all extensions of mains, including services and meters, and all enlargement of the capacity of the works necessary during the continuance of the agreement are to be made by the Defendant in Error at its own cost and

expense, and shall be its property. Article 4 provides for the division of the receipts, which does not appear to be relevant to the present controversy. Article 5 provides that neither party is to solicit any business belonging to the other, though each may take such customers of the other as may, voluntarily and without solicitation, desire to change from one to the other. Provision is then made by Article 6, for the adjustment of accounts and settlement of differences and misunderstandings by arbitration. Large liquidated damages are agreed on by the eighth Article, in case either party shall wilfully fail, omit or neglect to perform, or shall violate any of the covenants contained in the agreement, which is to take effect from October 15, 1884, and continue in force for thirty years.

It is not perceived that any part of the agreement thus stated can be supposed to be within the prohibition of public policy, unless it be that which provides the maximum and minimum rates at which the parties concerned stipulate that the sale of gas shall be made, and grants the right to the Defendant in Error, within certain limits prescribed, to fix a reduced price at which either or both shall sell, in case of competition from outside.

And, here, a few words as to

Public Policy.

The recognition of public policy, independently of statutory regulation, as a test of the validity of contracts, is, at best, the establishment of a very uncertain rule. In some plain cases it may undoubtedly be regarded as furnishing a satisfactory test, but in a large number of instances it depends so much on changing circumstances and the personal convictions and opinions of the judges by whom it is applied, that it has involved great uncertainty and variation in the decisions. The well-known observation of Justice Burroughs, in Richardson vs. Mellish, 2 Bingham, 229, 252,

that "Public policy is a very unruly horse, and when you once get astride of it you never know where it will carry you," was cited with approval in the very recent case of Davies *vs.* Davies, L. R. 36, Chancery Division, pp. 359, 364, where Mr. Justice Kekewich adopted it and said in connection with it, that public policy does not admit of definition and is not easily explained. "One thing," the Judge adds, "is clear, and it is that public policy is a variable quantity; that it must vary and does vary with the habits, capacity and opportunities of the public." This was said in a case involving an alleged illegal restraint on trade. The whole doctrine on that subject is fully considered, by the Court below and on Appeal, and the case strongly illustrates the extent to which public policy, in the trade aspect, is really matter of individual opinion.

And see 4 H. of Lords Cases, 437–439, *per* Lord St. Leonards, as to public policy, generally.

Also Ch. J. Best, in 2 Bing., *ub. supra.*

In the case of Hilton *vs.* Eckersley, 6 Ellis and Blackburn, 47, 64, Lord Campbell, Ch. J., declares that he enters upon the question of public policy, in relation to trade, "with much reluctance and with great apprehension, when he thinks how different generations of judges and different judges of the same generation have differed in opinion, upon questions of political economy and other topics connected with the adjudication of such cases."

The late Master of the Rolls, Sir George Jessel, deals with the subject in his characteristically vigorous way.

"It must not be forgotten," he says (in Printing, &c., Company *vs.* Sampson, 19 L. R. Equity, p. 165), "that you are not to extend, arbitrarily, those rules which say that a given contract is void as against public policy; because if there is one thing more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contract-

ing, and that their contracts, when entered into, shall be held sacred and shall be enforced by courts of justice. *Therefore you have this paramount public policy to consider, that you are not lightly to interfere with the freedom of contract.*"

And in precise uniformity with this is the law of Maryland, where the contract in dispute was made and was to be performed.

"It must be a very plain case to justify the Court in holding a contract to be against public policy. *It must be a case in which the common sense of the whole community would so pronounce it.*"

Trust Estate of Woods, &c., 52 Md., 520, 536.

"The question," says this Court, by Mr. Justice Story, in Vidal *vs.* Girard's Executors (2 Howard, 197–8), "what is the public policy of a State and what is contrary to it, if enquired into beyond these limits [*i. e.* its constitution and laws and judicial decisions], will be found to be one of great vagueness and uncertainty, and to involve discussions which scarcely come within the range of judicial duty and functions, and upon which men may and will complexionally differ."

"The power to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt."

Richmond *vs.* Dubuque, &c., R. R., 26 Iowa, 191, 202.

"The burden is on the Defendant to show that the enforcement of the contract would be in violation of the settled public policy of the State" and "necessarily attended with injury or inconvenience to the public."

Swann *vs.* Swann, 21 Fed. Reporter, 299, 301. Tindall, C. J. in Walsh *vs.* Fussell, 6 Bingham, 163; and see Greenhood on Public Policy, Rule 129, pp. 116, 117, and cases in notes.

This Court has practically enforced the same doctrine, in the familiar case of the Oregon Steam Navigation Co. *vs.* Winsor, (20 Wallace, 64) not only by the general tenor of the decision, but by adopting the rule of the English Courts (p. 70) that all agreements in restraint of trade are to be treated as divisible, if capable of such a construction, so that effect may be given to any of their provisions which are not against public policy. (See Baines *vs.* Gearey, L. R. 35 Chancery Div., 156.) Indeed, this is but an application, in part, of the broad, general principle emphatically recognized by this Court, as to contracts as well as statutes, that where an instrument is capable of two constructions, the one lawful and the other unlawful, the Courts are bound to adopt the former.

Hobbs *vs.* McLean, 117 U. S., 569, 576.
U. S. *vs.* Central Pac. R. R., 118 U. S., 235–240.

In view of all these considerations and of the cases cited, it is respectfully submitted, that the Court will not only not be astute in seeking reasons of public policy, for the annulment of the contract in dispute, but will give it validity and effect, by every fair and reasonable construction and presumption of which it may be found susceptible.

Construction of the Contract.

Although the older doctrine, which avoids contracts in general restraint of trade, is still respected in England, and has had the qualified sanction of this Court in the case of the Oregon Steam Nav. Co. *vs.* Winsor (20 Wallace, 64) above cited, the general current of authority is now undoubtedly against giving it any extension, or indeed any application that can be avoided. In the case in 20 Wallace, the difficulty of applying the rule is fully recognized, and the doctrine of reasonableness, under all the circumstances of the

particular case, is substantially laid down. The criterion established by Ch. Justice Tindall, in Horner *vs.* Graves, 7 Bingh., 743, (and also in Hitchcock *vs.* Coker, 6 Adol. and Ellis, 436) is recognized, which is to the effect that the restraint will not be regarded as unreasonable, unless shown to be larger and wider than the protection of the covenantee may possibly require. In the last cited case, Ch. J. Tindall lays down the further rule that the reasonableness of the restraint is to be determined, by the Courts, in each case, from all its surrounding circumstances—the nature of the particular trade and the mode and place of carrying it on, the populousness of the district, &c., &c. (Per Parke, Baron, adopting Ch. J. Tindall's language, in Mallan *vs.* May, 11 Mees. and Welsby, 652, 664, 666.)

And see Baines *vs.* Gearey, L. R., 35 Chy. Div., 154.
Davies *vs.* Davies, L. R., 36 Chy. Div., 359, 396, 397, 398.
Roussillon *vs.* Roussillon, L. R., 14 Chy. Div., 363.
Natl. Provid. Bank *vs.* Marshall, L. R., 40 Chy. Div., 112, 117.

In two of the cases last cited, it is held that the *onus* at this day rests upon the defendant, to prove that the restraint is excessive and unreasonable.

"The defendant seeking to put a restraint on the freedom of contract, must show that it is plainly necessary for the freedom of trade."

14 Chy. Div., *supra*, p. 365.
36 Chy. Div., *supra*, pp. 368, 369, 376–7.

In both of these cases, the *dictum* in Mitchell *vs.* Reynolds (1 P. Williams, 181, 193), that "where the contract may be good or bad, the law presumes it to be *prima facie* bad," is repudiated, as in Tallis *vs.* Tallis (1 Ellis and Bl., 391). In fact, that the case of

Mitchell *vs.* Reynolds has since been much weakened in its force, and that its foundation has been to a considerable extent removed, by circumstances, is now conceded.

36 Chy. Division, *supra*, 377.

1 Smith's L. C. (Part 2), 777.

Diamond Match Co. *vs.* Roeber, 106 N. Y., 473–488.

Greenhood *vs.* Public Policy, 688, 689.

Pollock on Contracts, 315–16, *et seq.*,

where the cases are classified and distinguished, and the whole question is discussed.

[redacted]

Of course the case here does not belong strictly to the class in which the doctrine as to "restraint of trade" is usually considered. But the law applicable to those cases is to some extent analogous, in principle, to that involved in the controversy at bar, and the authorities which have been cited are believed to bear directly upon the latter. They will be assumed to have established the doctrine, so far as they are applicable to this case;

First. That the test of public policy is to be applied with the greatest caution, and only in cases where it is made indubitable, by the party defending under it, that the enforcement of the contract in dispute will be necessarily attended with injury or inconvenience to the public.

"It must be unquestionable; there must be no doubt." If you once bring it to a doubtful matter of policy the Plaintiff must recover.

Best, C. J., in Richardson *vs.* Mellish, 2 Bingh., 229.

Second. That contracts involving the question of interference with trade are *prima facie* valid, and will be so held, in whole or in part, as the case may be, if, by any fair and reasonable

construction, they can be regarded as consistent with the trade-interests of the public, and do not go beyond what may possibly be required for the reasonable protection and legitimate interests of the covenantee, or of both parties, where both are to be protected.

Pollock on Cont., 315.

Combination and Monopoly.

But it was argued below, and the contention will probably be renewed here, that there was a combination between the two corporations, parties to the agreement, to control prices illegally, and give themselves a monopoly injurious to the public. It is not easy to perceive upon what ground this contention can fairly be rested.

Combination is not unlawful, certainly, except where it is for unlawful purposes, or the use of unlawful means, or both. Nor does the mere fact that corporations are the parties who combine, affect the validity of their arrangements, between themselves, any more than those of individuals. Questions of *ultra vires*, of course, belong to a different class of enquiry. The contract, in this case, was made, not only professedly, but obviously and on its face, for the purpose of putting an end, at the time and permanently, to a violent and exaggerated competition, which was ruining both of the companies by the establishment of rates below the cost of production. There is no evidence or pretence that the price at which they contracted to sell, in the future, was in excess of a reasonable and fairly compensating profit. There was no restraint put upon either, as to the amount of their production, nor was there any attempt to provide for the manufacture of inferior gas. The agreement leaves them both free to perform the duties to the public for which they were chartered. While it prohibits either from undermining the other by soliciting business already belonging to the other, it leaves them

entirely free to take such consumers from each other as may voluntarily, and without solicitation, desire to make the change. They have the entire freedom of all fair rivalry, through the superiority of their gas, or the greater facilities offered to customers, by which the latter may be attracted from one to the other. While they agree to sell at a named price, unless the rate shall be changed by arrangement between them in writing, it is, nevertheless, stipulated that the Defendant in Error, by reason of its much larger interest in the subject matter, shall have the privilege of reducing the rate at which either, or both, shall sell gas, in case of competition on the part of any other Gas Company, and shall have the right, at its discretion, to fix and change the price at which both shall sell, so long as such competition shall continue and no longer. It is not easy to perceive that any possible injury to the public, as consumers, can result from this last stipulation. A provision for the reduction, in any event, of the rates fixed upon, must be at least a present gain to the public, and the fact that such reduction is specifically provided for in the case of outside competition, goes to show, conclusively, that the object was not to prevent competition, except as between themselves, but rather to meet it by lowering their own rates.

So far from restricting the business, or the increase of accommodation to the public, the third article of the contract provides expressly for extension of mains and an enlargement of the capacity of the works necessary to do the increasing business during the continuance of the agreement; the larger and wealthier Company engaging to bear the expense of such extension and enlargement. The division of the receipts between the parties, is clearly a matter with which the public has no concern, as it could not in any way affect the interests of the community. These interests are fully provided for by allowing the price to be put down, in case of competition, to the cost of producing gas.

It will be observed, that although it is stipulated in the 1st Article of the Agreement (as has been said), that the price to be charged for gas by the parties may be changed at any time, and of course may be raised as well as lowered, this can only be done by the written consent of both parties. The privilege of Defendant in Error to fix rates, at its exclusive discretion, is strictly confined to cases where outside competition may arise, and then only while it lasts. Moreover it can only be exercised then, in reducing and not in raising the rate. As an increase of charge to the consumer can scarcely be regarded as one of those things which public policy requires to be promoted, there would not seem to be any objection on that score, to a provision by which the privilege of running up prices is checked or modified. The provision that prices should not be lowered except in case of competition, without the consent of both parties, was absolutely essential to the consummation of the purpose which induced the agreement, viz., the termination of a ruinous competition. In no other way could that lawful and reasonable end have been reached, and it is respectfully claimed, on the part of the Plaintiff in Error, that the provision is fairly and entirely within the principle, established by the cases cited, that no stipulation will be held invalid which is necessary for the protection of the contracting parties.

This principle was carried even further by Mr. Justice Story, in the case of Jenks *vs.* Coleman (2 Sumner, 221) already cited, where that eminent judge refused, against the argument of Mr. Webster, to instruct the jury, that they "must be satisfied that the agreement was necessary, or clearly expedient for the public interest and the interest of the proprietors of the boats." The Court, on the contrary, told the jury that "it was not necessary for the defendant to prove that the contract in the case was necessary to accomplish the objects therein stated; but it was sufficient if it was entered into *bonâ fide* and purely for their own interest and

the accommodation of the public, *from their belief of its necessity or its utility.*" He had previously ruled that "the true question was, whether the contract was reasonable and proper, in itself, and entered into with good faith and not for the purpose of an oppressive monopoly." The contract was one by which the proprietors of a Line of steamboats had agreed with the owners of the Citizens' Line of Stages to carry passengers, in connection with the Steamboat Line, between Boston and Providence. An agent of another and rival stage line insisted upon going on board the steamers to solicit passengers, "thus interfering with the patronage intended to be secured to the Citizens' Line" by the contract. The Court held that the Steamboat Line, the defendant, was justified in excluding him from its boats, if the jury should find the reasonableness and *bonâ fides* of the contract, &c., as above stated.

The cases in which the questions of monopoly, combination, &c., raised by the Defendant in Error, have been considered, are many and various, arising out of all sorts of agreements, and under every variety of circumstance. The latest, of importance, is believed to be that of the Mogul Steamship Co. *vs.* McGregor, decided, only a few months ago, by Lord Coleridge, Ch. J., and reported in L. R. Q. B. Div. 544, 552, 3, 4 and 37 W. R. 286.

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The plaintiffs were shipowners, trading between England and Australia and China. The defendants were shipowners, individuals and companies, trading between England and China, who, desiring to keep up the rate of profits, entered into a conference for the purpose of working the homeward trade, by offering a rebate of five per cent. to all shippers who shipped exclusively by the conference vessels. Defendants could not work their carrying trade at a profit unless they practically monopolized the tea trade during the tea harvest; and it was only the large profits they thus made, that enabled them to keep up a regular price during the year. Plaintiffs were admitted to the conference for a short time and then

excluded, and they brought suit for damages and an injunction, alleging a conspiracy on the part of defendants, consisting in a combination and agreement pursuant to which shippers were "bribed, coerced and induced" to forbear from shipping by plaintiffs' steamers. The Court held that the combination was not unlawful. Restraint of trade, the Ch. J. said, had nothing to do with the question. The combination was "no more in restraint of trade than if two tailors in a village agreed to give their customers five per cent. off, provided the customers would deal with them and them only." The Court recognized as a fact that the defendants could only keep up their business by practically monopolizing the tea trade during the harvest, and decided that the method adopted for preserving it was not unlawful. "They have a right," said the Ch. J., "to endeavor by lawful means to keep their trade in their own hands, and, by the same means, to exclude others from its benefits, if they can" (p. 552).

It is believed that this case fairly and properly represents the *consensus* of judicial opinion, as to the right of individuals or corporations to combine for the protection of their business interests, and that such combinations have none of the characteristics of monopoly, in its obnoxious sense. V. C. Page Wood (Hare *vs.* London, &c., R. W. 2 Johnson. & Hem. 80, 105) declared it to be "a mistaken idea that the public is benefitted by pitting two railway companies against each other until one is ruined, the result being at last to raise the fares to the highest possible standard." There is no reason why the same doctrine should not apply to all corporations, as well as to individuals.

"So far as agreements among the companies are meant to prevent this result, their purpose is not injurious to the public or illegal. . . . If an agreement of this character is a reasonable business arrangement to protect stockholders and creditors from loss, and does not cause unreasonably high charges or violate any

duty the companies owe to the public, it should be sustained and enforced by the courts."

2 Morawetz on Corp., Sect. 1131.

Indeed there is scarcely any subject upon which there are more erratic ideas than that of monopolies. The best economical writers, of the present day, are constantly dwelling upon the injurious effects of the popular and, to a great extent, political prejudice, under which the benefits to be derived to the public, from regulated monopolies, are so often lost, by confounding them with those which properly incur odium from their oppressiveness and injustice. This Court, in a well known series of carefully considered and masterly opinions, has refused to countenance any such confusion and has fully recognized the right of States to establish monopolies for public purposes, whenever the grant of exclusive privileges may be found necessary or advantageous to secure the public benefits proposed.

Slaughter House Cases, 16 Wallace, 36.

N. O. Gaslight Co. *vs.* Louisiana Co., &c., 115 U. S., 650.

N. O. Waterworks *vs.* Rivers, 115 U. S., 674.

Louisville Gas Co. *vs.* Citizens' Co., 115 U. S., 683.

By parity of reason, it would seem to follow, that in cases where contracts or combinations between individuals or corporations are assailed, because of their tendency to establish monopolies, the question of their validity does not depend merely upon the fact of their having that tendency, but upon a consideration of the consistency or inconsistency of the tendency or monopoly alleged, with the general interests of the public. Judicial as well as scientific reasoners are bound to accept the inevitable conclusion, stated tersely by a leading economist (Dr. Adams), that "if it is for the interest of men to combine, no law can make them compete."

Nor is there a hard and fast rule to be applied by the Courts, as matter of law, when they pass upon such questions. Mr. Justice Bradley said, in speaking for the Court in the case in 20 Wallace (above cited), in regard to the limits within which trade may be lawfully restrained, that "from the uncertain character of the subject, much latitude must be allowed to the judgment and discretion of the parties." "The presumption is," he added, "that the arrangement was mutually beneficial to both companies, and that it promoted the general interests of commerce, on the Pacific coast" (20 Wall., p. 69). This presumption is a necessary corollary of the modern rule above stated which the Court recognized in the case then before it, that contracts restraining trade are not *prima facie* invalid, but only to be pronounced so, when found unreasonable because the restriction is more than "commensurate with the benefit conferred."

Pollock on Contr., 315.

It would be idle to attempt to consider much less to reconcile all the cases in which the rule as to monopolies and combinations has been tested. In a case in Maryland, decided more than fifty years ago and argued by Chief Justice Taney, then Attorney General of the State (Davis *vs.* Barney, 2 Gill & Johns., 382), the defendant owning certain teams and coaches engaged in the transportation of passengers between Baltimore and Washington and Georgetown, in consideration of $9000, sold his equipment to the plaintiffs and bound himself to "withdraw all his pretensions to any part of said road" and "not to be concerned, direct or indirect, in any line of stages in opposition to" the plaintiff. A breach of the latter obligation was averred, in the setting up of an opposition line with Defendant's connivance and assistance. For the true construction of the contract the Court assumed and asserted more than once (pp. 401–2) that the object of the Plaintiffs, in the

transaction, "was manifestly to become proprietors of all the stages on that road and to shut out all opposition," but there was no impeachment made of its legality and the Court assumed it to be valid, in its decision, which was that the Defendant "should not only not become interested in any opposition line," but "not in any manner aid or become instrumental in setting up or carrying on" one. This decision was cited and approved, in the comparatively recent case of Guerand *vs.* Dandelet (32 Md., 561, 570), where the Court adopted the doctrine of the cited English cases, that contracts in restraint of trade will be valid, when the restriction is not "larger and wider than the protection of the party with whom the contract is made can possibly require." (p. 566.)

The law of Maryland in regard to the relation of corporations to each other, apart from statutory enactment, is somewhat peculiar. In Booth *vs.* Robinson (55 Md., 619), decided as late as 1881, it was held that one steamboat company could lawfully purchase and hold the stock of another, not only as an investment, but for the purpose of obtaining an influence in, or even a control over the management of the latter, though the two were to some extent rivals in business and had certainly conflicting interests (pp. 430, 433–448). The only qualification of the doctrine is that there must be no fraudulent design. The Code of Maryland, while it in no way furnishes any specific foundation for this decision, nevertheless provides, distinctly, that any corporations (whether formed under the general law, or special charter) may unite and form one new corporation with any other corporation, incorporated (as the Defendant in Error is) under the general corporation law, on such terms and conditions as they may agree on, when the stock of both has been fully paid up, and the two there or incorporated, in whole or in part, for the same purpose. (Md. Code of 1888, Vol 1, pp. 293–4, Art. 23, Sect. 29; Revised Code of 1879, p. 318, Art. 40, Sect. 36.) In this state of local decision and legis-

lation it is not going too far to say, that the public policy of Maryland is clearly not opposed to voluntary combinations of corporations nor even to the practical control of one corporation, by another of the same class and purposes. If it would have been legitimate for the Defendant in Error to obtain control of the Equitable Gas Company, by purchasing a majority interest in its stock (leaving the question of consolidation aside) and adopting the identical regulations which are embodied in the agreement under consideration, it is not perceived that to bring about the same result, in a different way, could be obnoxious to judicial censure.

These considerations would seem to supersede the necessity of referring to and much more of discussing even the principal cases in which trade contracts between corporations have been the subjects of adjudication, from the point of view of public policy. In 2 Hun., 496, 499 (Tonawanda R. R. *vs.* N. York & L. R. R.), one phase of the question was presented very broadly. The Plaintiff contracted to deliver, at all times, to the Erie R. R., all the freight and passengers it could legally control or influence, destined to points which could be reached by way of the Erie R. R. or any of its connections, and to use all its influence to promote the interests and business of the Erie R. R. with due regard for its own. The Erie R. R. made a similar contract, and in consideration of the performance of Plaintiff's engagement agreed to make good any deficiencies in Plaintiff's earnings, to meet the interest on its bonded debt, as it might accrue. Plaintiff, in return, agreed to deposit with the Erie the majority of its stock as collateral, and to give to the representative of the Erie the right to vote upon the stock so deposited. The contracts were held valid as traffic arrangements, for the mutual benefit of the companies, and the Court ruled that there was no reason why performance might not be secured by allowing the Erie to appoint such agents as would secure it.

In Leslie *vs.* Lorillard (110 N. Y., 519, 532, 3, 4) it was held

that an agreement by a steamship corporation to buy out a competing line, which for a monthly payment engage to discontinue running vessels between ports named, and not to charter or sell its vessels for use on that route, or become interested in the running of steamboats therefrom, was held valid and within the discretionary powers of the directors. The Court adopted and approved of the doctrines laid down in the recent case of The Diamond Match Co. *vs.* Roeber (106 N. Y., 473), where it was held that no contract is void, as in general restraint of trade, which operates simply to prevent one party from competing or engaging in the same business with another. This is the same conclusion which appears to have been tacitly arrived at in the Maryland case of Davis *vs.* Barney already cited.

In the case of The Diamond Match Co. *vs.* Roeber, *ubi supra*, confirmed in 42 Hun., 496, a contract not to engage, for ninety-nine years, in the manufacture or sale of matches, except in the service of the purchasing Co., in any of the States or territories, except Nevada and Montana, was held valid. The cases, from Mitchell *vs.* Reynolds down, and the present force and application of that case, under the altered circumstances of trade, are briefly and ably discussed and the conclusion is arrived at, that "public policy and the interests of society favor the utmost freedom of contract, within the law, and require that business transactions should not be trammelled by unnecessary restrictions." It is added that "*a party may legally purchase the trade and business of another for the very purpose of preventing competition, and the validity of the contract, if supported by a consideration, will depend upon its reasonableness as between the parties.*"

In full accord with the expressions of the opinion in this last case, in regard to public policy, and those of Sir George Jessel, M. R., above quoted (which the New York Court repeats), is the doctrine of this Court. Speaking through Mr. Justice Field, in

R. R. Company *vs.* Richmond (19 Wall., 584, 590), the Court says, that "the observance of good faith between parties, and the upholding of private contracts and enforcing their obligations, are matters of higher moment and importance to the public welfare, and more far reaching in their consequences," than even the public policy which requires that commercial intercourse between the States shall be free and untrammelled.

In the case of the Central Slade Roller Co. *vs.* Cushman (143 Mass., 353, 363) it was held that a contract to prevent competition between several parties, in the sale of a particular article, was for a lawful purpose and valid. The contract was between a person and three manufacturers, under several patents, for the purpose of creating a corporation and forming a combination, to regulate competition between them for the sale of a commodity which they severally made. It provided for the sale of that commodity, at uniform prices, by all the parties, for three years, no matter by which of the parties manufactured. The Court held that its purpose was legitimate, to prevent the injurious effect, on both producers and consumers, of undue competition. It did not restrain production or offer inducements to that end. It did not look to withholding supply from the markets in order to enhance prices. There was just as much inducement for the parties to sell and supply the public demand, after the contract as before.

Skrainka *vs.* Scharringhaus, 8 Mo. App., 522, was a case where the business of quarrying in a certain district had become ruinous from excessive competition. Twenty-four quarrymen formed a combination, to raise the prices to a fair point and develop the business into a profitable one, and agreed to sell no rubble stone, from any quarry in the district, for less than a fixed price. The agreement was held valid.

So an agreement by a railroad to build its road, so as to connect

with another and *that the charges for transportation should be regulated by both companies* together, was held valid. An injunction was accordingly granted to restrain a change of grade which would break up the connection.

Columbus P. & I. R. R. *vs.* Indianapolis R. R., 5 McLean, 450–454.

And see Androscoggin R. R. *vs.* Androscoggin, &c., 52 Maine, 417, 434.

Greenwood on Pub. Pol., 324, Rule 270.

The observations condensed above from the opinion in 143 Mass. furnish the key to the distinction upon which the validity or invalidity of the class of contracts in question depends. It will be found, in all the cases in which they have been declared invalid, that they have been held to provide for or induce a limitation or reduction of the supply for the market, in order to dominate it; or to provide for the imposition or maintenance of extravagant or oppressive rates; or to prevent men from getting employment, or deprive them of it arbitrarily; or to take away their freedom of labor—or, in the case of corporations, with duties to the public, to disable or absolve them from the performance of those duties. Of the mass of cases in which these illegalities have been held fatal, the following are believed to be representative:

Holton *vs.* Eckersley, 6 El. & Bl., 47.

Hornby *vs.* Close, L. R., 2 Queen's B., 193.

Collins *vs.* Locke, L. R., 4 App. Cases, 674.

Thomas *vs.* R. R. Co., 101 U. S., 71, 83.

St. Louis *vs.* Gaslight Co., 5 Mo. App., 484.

Arnot *vs.* Pittston Co., 68 N. Y., 558.

India Bagging Association *vs.* Kock, 14 La. An. 168.

Morris Run Co. *vs.* Coal Co., 68 Pa. 173.

The case of Collins *vs.* Locke (*ub. supr.*) is particularly important and illustrative, in this connection, because there were two stipulations, one of which was held valid and the other void, and the reasons for the distinction, under the adjudged cases, were fully set forth and discussed. The agreement, which was declared valid, was one to parcel out the stevedoring business of a certain port, amongst the parties to it, so as to prevent competition, at least among themselves, and also, possibly to keep up prices. If carried out, by provisions reasonably necessary for the purpose, it was not invalid, although it might create a partial restraint on the parties, in the exercise of their trade (L. R., 4 App., 678–685 *et seq.*). The stipulation rejected was held not distinguishable from that in Holton *vs.* Eckersley (6 E. & B., 47, 67).

Defendant's First Prayer.

It remains only to add, upon the point under discussion, that even if the Defendant in Error could have maintained the defence that the agreement was against public policy, his first prayer, granted by the Court, was substantially vicious, in assuming a material fact in dispute, which should have been left to the jury, *viz.*, that Plaintiff claimed compensation "*for the procuring of the making*" *of the contract offered in evidence.* The materiality of this assumption will be fully shown, when the second prayer of Defendant in Error comes up for consideration. The pleadings to which the prayer specifically refers will show (see p. 3) that the services claimed for by Plaintiff were not for procuring the making of the contract, but for "negotiating and consummating an arrangement and settlement of difficulties" between these two gas companies. "Procuring the making of the contract" does not, of course, mean procuring the Defendant in Error, itself, to make it, for that would have been a service rendered to the Equitable

Company and not to the Defendant. It means procuring the Equitable Company to make the contract, because, for that only the Plaintiff could demand compensation from the Defendant. Now the distinct evidence is (Rec., foot of p. 7) that the Equitable Company itself took the initiative, and employed Plaintiff "to bring about a settlement [in other words, to 'procure' one], if possible, with the Defendant." This fact was recognized in all Defendant's prayers, except the first and second. It was mooted, however, at the trial, and, upon the admission of the Bill of Exceptions, there was evidence before the jury tending to show that the service claimed for was "in procuring and inducing the Equitable Company to combine and contract with Defendant" as set up in Defendant's first and second prayers. It was consequently put before the jury, by Plaintiff, as part of the hypothesis of fact assumed in his first prayer (Rec., p. 11). But it was demonstrably a disputed fact, regarded by the Defendant as vital, and certainly material. The Court had no right to settle the question of proof or disproof and assume and take away from the jury the determination of the fact.

Defendant's Right to the Defence of Public Policy.

The case has thus far been discussed, as if the right of the Plaintiff in Error to recover, for his services in the negotiation and consummation of the contract, depended upon its enforceability as between the parties. None of the cases cited consider the question of public policy, except as a defence set up to the enforcement of the contract. Indeed, except where there was a criminal conspiracy, or cause for dissolving a corporation, there is no other way in which it could have arisen. The Courts do not annul contracts, *sua sponte*, because in opposition to public policy. They simply refuse to enforce them. But although they cannot

be enforced, it is not illegal for the parties to carry them out, and if they do so, though not compellable, they become entitled, upon execution of the consideration, to claim the promise or payment due in respect of it.

Leake on Contracts (Lond., 1878), 738.
Bishop *vs.* Kitchin, L. R. 38, Q. B. 20.

Even where contracts are positively immoral or otherwise illegal, the property earned or accumulated and the benefits resulting from them, if they are carried out between the parties, will be dealt with according to equity, and the contracts themselves will be evidence to define the relation of the parties to the property acquired under them.

Planters *vs.* Union Bank, 16 Wall., 483.
Western Union *vs.* Burlington, 3 McCrary, 138–139.
Cook *vs.* Sherman, 4 McCrary, 33.

In the case at bar, it is conceded that the agreement went into operation and there was evidence to show that the arrangement was "of great value and importance to the Defendant" (see Plff's Prayers, pp. 11 and 12). There is no evidence or suggestion that it has ever been repudiated or complained of by either party. It is an executed agreement, to the stipulations of which both the contracting parties have cheerfully submitted and under which they have carried on their business. No proceeding has ever been taken by the State to bring them to account for a violation of their respective charters in making it. Under the decision of the Queen's Bench in Bishop *vs.* Kitchin (L. R. 38, Q. B., 20) the agreement having been executed, the parties, having submitted to its terms, are clearly entitled to the benefit of the consideration stipulated. In this state of the law, is it possible that the Defendant can set up, as against the intermediary who negotiated

the contract thus redounding to its great benefit, an invalidity which neither it nor the Equitable Company has ever alleged against the agreement, or permitted to interfere with its profitable execution as between them?

And it will be observed, too, that the only invalidity alleged is in provisions for the benefit of the Defendant and not the Equitable Company—provisions which of course the Defendant could not have set up, as against public policy, if it had been sued by the Equitable Co. on the contract.

Of course and especially since the decision of this Court in Irwin *vs.* Williar (110 U. S., 499, 509, 510) it is established law, that agents employed in the negotiation of illegal contracts, "may be so connected with the immorality of the contract, as to be affected by it." But it is held at the same time in that case, as in Roundtree *vs.* Smith (108 U. S., 269, 276) that "they are certainly not in the same position as a party sued for the enforcement of the original contract." It is only where the agent is "privy to *the unlawful design of the parties*, and brings them together *for the very purpose of entering into an illegal agreement*, that he is *particeps criminis* and cannot recover for services rendered in forwarding the transaction." But the contract there was a wagering contract disguised in a legal form and held illegal and void, because of its being *contra bonos mores*—"a fraud upon the law and public morals"—(Stewart *vs.* Schall, 65 Md., 307, 8, referring to Irwin *vs.* Williar *supra.*) Of such illegality every one is bound to take notice. Even as to such contracts it has been forcibly said, on the Circuit, in 8 Bissell, 214 (Gilbert *vs.* Gauger) that "while it may be right, as a matter of public policy, to prevent parties from gambling, by refusing to enforce gambling contracts between them, yet it is at least doubtful whether they should be allowed to gamble at the expense of others, and not pay those whom they employ to do the work."

It is respectfully submitted that the rule laid down in Irwin *vs.* Williar does not apply to cases where public policy intervenes in the interest of trade. It would be very hard, indeed, if invalidity, which, having no rigid definition, can only be determined by judicial decision—and about which the many cases hereinbefore cited show the great diversity of judicial thought—should be treated as so absolutely known to an agent engaged in negotiating a contract *primâ facie* valid, as to disqualify him, *ab initio*, from receiving compensation for arduous, successful and (to his principal) profitable service.

It is undisputed here, upon the evidence, that the precise purpose which brought the Plaintiff into the transaction, was the desire of putting an end to a ruinous competition between the two gas companies, from the effects of which the whole gas interests in the country were suffering. He could have had no motive for promoting an unlawful agreement, which could not be enforced by or against either. All his interests and inclinations lay in the direction of a lawful and obligatory arrangement. The idea of illegality was never suggested till he asked for his pay. There is no intimation that he knew or suspected, in fact, that the agreement had any such taint. On the contrary, its lawfulness was certified to him, emphatically, by the fact that it was not only satisfactory to the Defendant, but was attested and presumably prepared—certainly sanctioned—by the same learned and upright counsel, of whose service Defendant has the advantage at this hearing.

Clearly this is not a case where the agent brought the parties together "*for the very purpose* of entering into an illegal agreement." One may be pardoned for believing that any of the Courts, which have dealt with business contracts, having no element of illegality but their possible violation of public policy, would have been surprised if they had been called upon to deny

to the agents or intermediaries of the parties the proper compensation for their services.

It may further be observed that the rule of public policy, if applicable at all to the agents who negotiate contracts adjudged to be in conflict with it, must apply to the agency itself. It may well be against public policy to enforce certain contracts, but not necessarily so, at all, to punish parties whose relation to them is merely collateral. There must be some reason, inconsistent with the interests of the public and independent of the contract, for preventing a man from recovering for his work and labor in consummating it. The contract being one, as here, which it was perfectly competent for the parties to carry out and profit by, if they saw fit, without being amenable to challenge or punishment, how can it be against the policy of the law to compel them to pay for it? Honesty is the best policy in such cases—and all.

Of course, if the Court should find any part of the agreement in this case free from objection on grounds of public policy, there is an end to the defence which seeks to defeat liability on that ground.

Should the contract be held invalid, merely because *ultra vires* of each or either corporation, it is presumed that the defence will not be insisted on. Independently of the doctrine so firmly established by this Court, that the defence of *ultra vires* shall not be set up by a party who has had the benefit of the transaction, it must be plain that a man who renders service to a corporation, as its agent, cannot be denied his just reward, because the transaction in which he has earned it should turn out to be beyond the chartered powers.

The Second Prayer of the Defendant in Error.

The Defendant's second prayer requires notice because, although rejected by the Circuit Court, it may, if tenable, prevent the case

from being remanded, even if this Court should hold that the first prayer was improperly granted.

The second prayer (*ante* p. 4, and Rec., p. 8) requests the Court to instruct the jury that the Plaintiff is not entitled to recover on the pleadings and evidence, "because the *only services* claimed or proved to have been rendered by Plaintiff, were in *procuring or inducing the Equitable Gaslight Company to combine and contract with the Defendant*, which was and is unlawful for said Equitable Company to do."

As already shown this prayer is plainly vicious in taking from the jury the determination of the disputed fact, whether the "procuring and inducing" alleged were the only services claimed or proven to have been rendered. Not only do nearly all the other prayers of Defendant assume that this was a matter for the jury to find, but the evidence recited on pages seven and eight of the Record shows distinctly, that the Equitable Company itself employed the Plaintiff to bring about a settlement, if possible, with Defendant, who was only to be paid if the settlement should be satisfactory to the Equitable Company. The negotiations were with Defendant by Plaintiff as agent of both Companies, and they were carried on "by proposition and counter-proposition," till they resulted in the agreement in controversy. There is not the slightest pretense, in the evidence, of any procurement or inducement of the Equitable Company by the Plaintiff beyond this. If he procured or induced either, he procured or induced both to make the arrangement, and as he represented the Equitable only at first, and approached Defendant, on its behalf, to induce Defendant to come to terms, and brought about a settlement by negotiating for and with both, and making a settlement satisfactory to both, there is no ground for the assumption that his only intervention was to induce the Equitable Company—already and from the beginning anxious enough—to put an end to their ruinous competition.

Whatever, therefore, may be the merits of the point intended to be made by the second prayer, the prayer itself was bad and could not have been granted. The point arises out of a provision in the amended charter of the Equitable Company (Laws of Md., Acts of 1882, Ch. 337, p. 550). The Company was chartered by the Act of 1867, Ch. 132, p. 207, and was granted power to lay pipes and exercise its functions only within the limits of the City of Baltimore. The right to amend, alter or repeal was reserved to the State. In 1882, by a supplement to its charter, the sphere of its operations was extended to Baltimore County, which is immediately circumjacent to the City. By the 4th section of said supplement, a provision (technically known, in legislative art, as a "rider") was enacted in the following words:

"Be it further enacted that the said Company be and it is hereby prohibited from entering into any consolidations, combinations or contracts with any other Gas Company whatever, and any attempt so to do or to make such combinations or contracts as herein prohibited, shall be utterly null and void."

There is no evidence that the supplemental charter, thus condemning the Company to perpetual isolation and depriving it alone, of all other corporations, not only of the right of consolidation, existing under the general law of the State, but even of all power to contract with other gas companies, was ever accepted by the Equitable Co. or acted on in any way. On the contrary, the very agreement here in dispute (p. 4) recites that the two companies "conduct the business of making and selling gas, *in the city of Baltimore*," and applies only to that business.

But whether the supplemental charter has ever been accepted, or not, or whether the section referred to is to be construed as precluding the Equitable Company from making an arrangement essential to save it from bankruptcy; or whether as suggested below, the section is to be taken as a separate enactment, inde-

pendent altogether of the supplemental charter, and binding, whether the latter be operative or not: does not appear to be material in this case. The Defendant in Error was not only not restricted by its own charter from making combination or consolidation with other gas companies, but was specifically authorized to do so, by the general corporation law, as above stated. If it chose and was satisfied to rely upon the engagement of the Equitable Company and to act on the belief that it would keep faith, although its contract was not binding upon it, and the agreement was made and faithfully kept, and the Defendant derived great advantage from it, there is some difficulty in understanding how the statutory prohibition upon the Equitable Company can exonerate Defendant from its own obligations to the Plaintiff. The number of cases is too large to require citation, in which this Court and the State Courts have held that a forbidden contract, made by a corporation for good consideration received and executed, although void in law, may still be the foundation of rights acquired by the transaction, as between the parties themselves. And where such rights, of large value, have been so acquired and used, a corporation can have no standing in Court to repudiate the claim for compensation, made by an agent who has assisted it in acquiring them. There is no evidence here that the Plaintiff, who was a resident of Philadelphia, had any actual notice of the statutory prohibition referred to, and although it is quite true that a party contracting with a corporation is bound to take notice of the limitations of its charter, it would seem very unreasonable to apply the same rule to a party like the Plaintiff, who had nothing to do with the powers of the Equitable Company and was not put upon enquiry, as to its ability to make a contract which the Defendant was content to accept for its own advantage.

[It may here, with propriety, be noted, for whatever it may avail as to the public policy of Maryland, that the Legislature of the

State in 1886, by special statutes, prohibited the formation of any new gas companies in Baltimore City and other localities, and repealed the charters of all existing companies in the same, which had not already erected works and began the manufacture of gas. It forbade, at the same time, all gas companies chartered outside of the City, from laying mains or selling gas, in the City. See Acts of 1886, Chapters 384 and 395.]

It is respectfully submitted that for the reasons above assigned, the Defendant's first prayer was not only vicious, as framed, but should still have been rejected if it had duly raised the point which it was intended to raise.

The Defendant's Other Prayers.

Should the Court remand the case, it may see fit, for the guidance of the Court below, to pass upon the remaining prayers.

Defendant's third prayer appears to be founded on the theory that the Plaintiff acted exclusively, in the negotiations, as agent of the Equitable Company and made them solely through its employment and asks the Court to say that he cannot for that reason recover, upon the pleadings and evidence. The pleadings expressly claim (Rec., p. 3) for services rendered by Defendant, and at its request, in the negotiation and consummation of the agreement. The evidence shows that Plaintiff notified Defendant that he was employed by the Equitable Company but should expect and claim compensation from it also, if he could bring about a settlement satisfactory to it. Plaintiff's first prayer (Rec., p. 11) sets up as its theory of fact, that the Defendant accepted his services after such notification and negotiated with the Equitable Company through him and not otherwise, and procured through him the consummation of the agreement. It is admitted in the Bill of Exceptions (p. 8) that Plaintiff gave proof tending to

establish these facts. Defendant's third prayer was consequently vicious, in asking the Court to assume, as established fact, what was one of the principal contested facts in the case.

Defendant's fourth prayer assumes that Plaintiff could only recover, upon an express promise of Defendant to pay him, and asks the Court to say that there was no evidence from which the Jury could find such express promise. It is respectfully asserted that there is no reason in law why Defendant should not be liable on an implied as well as an express promise or why an express promise may not be inferred, and further that the prayer ignores the facts set up in Plaintiff's prayers from which the Jury might lawfully find an implied or even an express promise.

Defendant's fifth prayer is believed to be plainly objectionable, in ignoring the whole of the disputed facts from which the Jury might find an implied or express promise.

Defendant's sixth prayer reasserts the proposition that Plaintiff could only recover on an express contract.

Defendant's seventh prayer goes upon the theory that if Plaintiff was the agent of the Equitable Company, he could not for that reason act for, or earn the right to compensation from Defendant, although he fully and duly notified it of his employment by the Equitable Company. The prayer also assumes that if Defendant, when told by Plaintiff that he should expect compensation for it, denied his right to claim any because he was agent of the Equitable Co. Defendant was not liable, although the Jury might find that "Plaintiff thereafter continued such labor *with the knowledge and without objection of Defendant.*" A prayer which rests on enumerated facts can only be good, provided all the other facts not enumerated, if believed by the Jury, would not alter the law. If the Jury believed not only that Plaintiff continued his labors, "with the knowledge and without objection of the Defendant" but that it afterwards negotiated with the Equitable "through

him and not otherwise, and accepted his services in said negotiation, and finally procured through him the consummation of the agreement," it is believed that the theory of law asserted by the prayer clearly cannot be maintained. Defendant's eighth prayer is obnoxious to precisely the same objection.

Prayers of Plaintiff in Error.

The Plaintiff's first prayer rests on the common doctrines of implied *assumpsit*. It asserts the proposition that even if Defendant did, at first, refuse to employ Plaintiff to carry on the negotiations for it, yet if, afterwards, knowing that he claimed and expected compensation from it, Defendant negotiated through him and not otherwise with the Equitable Co. and accepted his services in the negotiation, and procured the consummation of a satisfactory and beneficial agreement through him, he was entitled to recover what the Jury might find to be a fair compensation. The second prayer introduces the element of a promise, on the part of the Defendant through its committee, that if he would leave it to the committee he "would be in good hands," or that "the committee would deal fairly with him," or words to that effect, "provided he brought about a successful and satisfactory arangement." It claims that if Plaintiff did accordingly go on and was successful, &c., he was entitled to recover what the Jury might find to be a fair compensation for his services. The third prayer refers to the rule of damages and will hardly be contested. The first and second are believed to be supported by well recognized principles, and if so, there was not only error in granting Defendant's first prayer, but in rejecting each and all of the Plaintiff's.

The law of assumpsit for work and labor is too rudimental to discuss. The Court of Appeals of Maryland has said (Spencer *vs.* Trafford, 42 Md., 20):

"If the Plaintiff rendered services, the Jury could infer an agreement, expressed or implied, to pay him. The mere fact of rendering services useful to the Defendant would furnish *prima facie* evidence of their acceptance, and, in the absence of some proof to the contrary, the law would raise an obligation to pay him what they were worth, there being no proof of special value."

In Pollock on Contracts, p. 10, the rule is stated with precision: "If A. with B.'s knowledge, but without any express request, does work such as people, as a rule, expect to be paid for, [and *a fortiori* where A. notifies B. that he expects compensation, as here], if B. accepts the work or its result, and if there are no special circumstances to show that A. meant to do the work for nothing, or that B. honestly believed that such was his intention, there is no difficulty in inferring a promise by B. to pay what A.'s labor is worth. . . . The doing of the work, with B.'s knowledge, is the proposal of a contract, and B.'s conduct is the acceptance."

S. T. WALLIS,
For Plaintiff in Error.

Supreme Court U. S.
FILED,
MAR 19 1889
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 220.

WILLIAM W. GIBBS, PLAINTIFF IN ERROR,

vs.

THE CONSOLIDATED GAS COMPANY OF BALTIMORE CITY, DEFENDANT IN ERROR.

WRIT OF ERROR TO CIRCUIT COURT OF THE UNITED STATES DISTRICT OF MARYLAND.

BRIEF FOR DEFENDANT IN ERROR.

R. D. MORRISON,
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Attorneys for Defendant in Error.

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BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF FACTS.

This was an action of assumpsit, brought in the Circuit Court of the United States for the District of Maryland, by the Plaintiff in Error.

The action was brought, as is shown by the bill of particulars and bill of exceptions, to recover compensation for services alleged to have been rendered the Defendant in Error, in procuring the making of a contract, between the Defendant in Error and another Corporation, called the Equitable Gas Light Company of Baltimore City, which contract is found on page 4 of the record.

It appeared from the evidence that the two Gas Companies were, prior to the making of the aforesaid contract between them, engaged in a gas war, in the course whereof the price of gas had been reduced to a very low figure. That the Plaintiff, being the general manager of a Corporation whose business was the owning of gas properties throughout the country, was much interested in bringing said war to a termination. That he therefore suggested to the President of the Equitable Gas Company to employ him to bring about a settlement—and being so employed, he opened negotiations with the Defendant Company.

The Plaintiff then offered evidence tending to show that during the negotiations with the Defendant he had informed the Defendant of his employment by the Equitable Gas Company, and that he was to be paid for his services by said company, and also informed the Defendant that he expected to be paid by it in case he should bring about a settlement satisfactory to both parties.

The Plaintiff also proved that the making of the contract between the Companies found on page 4 of the record, was the result of the negotiations carried on by him.

The Defendant after offering evidence tending to contradict the plaintiff, and to show that it had always during the negotiations regarded the Plaintiff as the paid agent of the Equitable Gas Company, and had itself never employed him, offered in evidence Chapter 132 of the Acts of the General Assembly of the State of Maryland of 1867, incorporating the Equitable Gas Company, and also Chapter 337 of the Acts of 1882, amending said Act of 1867. The Caption and fourth Section of the Act of 1882 are as follows:

ACT OF 1882.

AN ACT supplementary to the Act entitled "An Act to incorporate the Equitable Gas Light Company of Baltimore City," passed at the January Session, eighteen hundred and sixty-seven, of the General Assembly of Maryland, chapter one hundred and thirty-two of the Acts of said session.

SEC. 4. *And be it enacted,* That the said Company be and hereby is prohibited from entering into any consolidations, combinations or contracts with any other Gas Company whatever; and any attempt so to do, or to make such combinations, or contracts, as hereby prohibited, shall be utterly null and void.

INSTRUCTIONS.

The Court, at the conclusion of the testimony, granted the Defendants' first prayer (Rec. pg. 8) and took the case from the jury, holding that the plaintiff could not recover compensation from the defendant for procuring the making of the contract found on page 4 of the record, by the Equitable Gas Light Company, because said contract was illegal and void.

POINTS OF LAW.

The Defendant in Error submits that the following propositions are clear law.

1st. That services rendered in inducing a third party to do an unlawful act, can form no basis for an action; and it is immaterial whether the unlawful act was *malum prohibitum*, or *malum in se*, or contrary to public policy.

2nd. That the services alleged to have been rendered the Defendant in Error, by the Plaintiff in Error, were in and about procuring the Equitable Gas Light Company of Baltimore City to enter into the agreement found on page 4 of the Record, the making of which agreement by said Equitable Company, was both *malum prohibitum* and contrary to public policy.

I.

For the proposition that no recovery can be had for services in forwarding an unlawful transaction, or procuring the making of an illegal contract, it is sufficient to cite the case of Irwin & Williar, 110 U. S. 510, and Stewart vs. Schall, 65 Md. 308, in both of which it is said that where the

plaintiff is privy to the illegal contract, "and brings the parties together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services rendered or losses incurred by himself in forwarding the transaction."

Both of the above cases were brought by brokers for compensation for services in or about the making of wager ing contracts, which are held illegal as contrary to public policy, and the same rule would apply *a fortiori* where the making of the contract was directly prohibited by statute. In the case at bar the sole claim of the plaintiff is for his services in bringing the parties together for the purpose of entering into the contract found on page 4 of the record. This brings us to the question whether or not this contract between these companies was unlawful.

II.

The Defendant in Error contends that the contract was illegal:

A. Because against public policy.

The parties to the agreement were quasi-public Corporations, with certain duties to perform to the public.

The legislative grant of a right to supply gas to a municipality and its inhabitants, through pipes and mains laid in the public streets is the grant of a franchise vested in the State, in consideration of the performance of a public service.

New Orleans Gas Company *vs.* Louisiana Light Company, 115 U. S. 650.

Louisville Gas Company *vs.* Citizens Gas Company, 115 U. S. 683.

Two such Corporations cannot, on grounds of public policy be allowed to make a contract which is expressed on its face to be for the purpose of ending the competition between them, when presumably the purpose of the Legislature in incorporating the second Company was for the sake of having competition, and which contract as a means of ending such competition provides:

1st. That the price of gas to the consumers shall be raised to $1.75 per thousand feet, and that neither company shall

charge less without the consent of the other, except in case of new competition.

2nd. That the entire net receipts from the sale of gas should be pooled and divided between the Companies in a fixed ratio without regard to the amount of gas actually supplied by either.

3rd. That one of the Companies should lay no more pipes or mains for the supply of gas in the city, but that all future pipes or mains needed should be laid by and remain the property of the other Company, and

4th. That the Company violating the provisions of the agreement should pay to the other $250.000 as liquidated damages.

This agreement is contrary to public policy because:

1st. Its object is to prevent competition in the supply of gas, which competition was for the public interest, and which it was the legislative object to create by the incorporation of two companies to supply the same territory, and by preventing competition to increase the price to the consumer.

2nd. The inevitable result of the pooling arrangement whereby the net profits were to be divided in a fixed ratio, without regard to the amount of gas supplied by either Company, or the number of its consumers, would be to render both Companies indifferent to the proper service of the public, since it could make no difference to either of them how many or how few customers for gas either had, as compared with the other, and it could make no difference to either what quality of gas it furnished the consumer, who was to be at the mercy of the combination as to both quality and price of the article furnished.

It is seriously stated by the Plaintiff as to this agreement between these Companies, "that there is no restraint put upon either as to the amount of their production, nor is there any attempt to provide for the manufacture of inferior gas," and again, "they have the entire freedom of all fair rivalry through the superiority of their gas, or the greater facilities offered to consumers by which the latter may be attracted from one to the other." As human nature is now constitued, especially incorporated human nature, it might be regarded

as a certainty that as the price of gas went up under an agreement like this the quality would go down.

3rd. The agreement contained a provision whereby one of the Companies agreed not to perform its corporate duties in extending its mains and pipes when made necessary by increase of business.

Agreements of a similar character have repeatedly been held illegal on grounds of public policy, when made by transportation companies, on the ground that they tended to injure public interests by preventing the due performance of the duties for which such Companies were incorporated and in consideration of the performance whereof they had received valuable franchises.

And it is submitted that there is no difference in principle between transportation Companies and gas Companies in this regard. Agreements whereby the due performance of their public duties is endangered or prevented, are equally illegal when made by either.

Morris Run Coal Company *vs.* Barclay Coal Company, 68 Pa. 173.

Hartford and New Haven R. R. Co. *vs.* N. Y. & N. H. R. R., 3 Robertson, 411.

Stanton *vs.* Allen, 5 Denio, 435.

Charlton *vs.* New Castle and Carlisle R. R. Jur. N. S. 1096.

St. Louis *vs.* Gas Light Co., 5 Mo. App. 484.

The Plaintiff in Error as to this question of public policy, contends

1st. That public policy is a variable quantity apt to mean only the individual opinion of the particular Court, or as said by Mr. Justice Story in Vidal *vs.* Girard's executors, "what is the public policy of a State and what is contrary to it, *if enquired into beyond these limits,* [*i. e. its constitution and laws and judicial decisions,*] will be found to be one of great vagueness and uncertainty," and that as a consequence, when the public policy of a State is not declared, courts will not be astute to declare contracts void by reason of some possible inconveniance to the public.

This the Defendant in Error freely admits.

It is, however, equally true that where the public policy of the State *is expressly* declared by statute, the subject is no longer vague and uncertain, and Courts will not hesitate to carry out the public policy as thus declared by declaring acts in contravention of it unlawful.

Can there be a question as to the public policy of the State of Maryland as to this contract, in view of the statute, already quoted, forbidding the making of any such contract by the Equitable Gas Company?

There can be no doubt that for a long time prior to the making of this contract, the policy of the State of Maryland was in favor of free and unrestricted competition between Gas Companies.

By the provisions of the law relating to the formation of Corporations, any five or more persons, a majority being citizens of the State, could form a Gas Company.

Article 40, Revised Code 1879, Section 30, Class 17.

And by section 96 of the same article the special inducement for the formation of Gas Companies was held out, that they should have the right to lay pipes in the streets of any city or town without being required to obtain the consent of the municipal authorities.

It is true that under the 36th section Gas Corporations, like all others, could consolidate in the manner therein described.

But after the Defendant Company had been formed by such a consolidation as is indicated by its name, the Legislature, true to its policy of securing to the public competition in the supply of gas in Baltimore City passed the act hereinbefore quoted, by which it at least sought to provide that there should be one Gas Company there which should not be at liberty to consolidate or combine with any other in any way whatever.

2nd. The Plaintiff in Error contends further that although the contract in question may tend to produce a monopoly, yet all monopolies are not illegal. Citing the well-known decisions of this Court holding that a State may grant a monopoly, and other decisions holding that corporations and

individuals may lawfully contract to fix prices, &c., and also a statement by Dr. Adams that "if it is for the interests of men to combine, no law can make them compete."

The Defendant in Error again admits that the Plaintiff is correct in his general statement of law, which he summarizes thus: "In cases where contracts or combinations between individuals or corporations are assailed because of their tendency to establish monopolies, the question of their validity does not depend merely upon the fact of their having that tendency, but upon a consideration of the consistency or inconsistency of the tendency or monopoly alleged with the general interests of the public."

But must we not first look to the statute law to determine what is or is not for the general interests of the public? Surely so. And in the case at bar we find that the Legislature was evidently of the opinion that anything tending to monopoly in the manufacture of gas was contrary to the public interest. How, then, can any Court fail to declare a contract tending to produce such a monopoly, void?

It is not contended by the Defendant in Error, as the Plaintiff seems to assume, that two corporations, independent of any statutory prohibition, cannot lawfully agree between themselves as to the price at which they will furnish to the public a certain article, provided always that the price so agreed upon be reasonable and not excessive.

If such an agreement were all that the contract in controversy here contained, we admit that it might be unobjectionable on grounds of public policy, leaving out of consideration the statute expressly prohibiting one of the Companies from making *any* contract with any other Gas Company.

But the contract offered in evidence in this case contained more than that.

It does not, as the Plaintiff in Error contends, "leave them both free to perform the duties to the public for which they were chartered." The contract expressly forbids one of the Companies to extend its mains to any section of the city where they were not already laid, although it was chartered for the purpose of supplying gas to the city generally, and the Mayor of the city was authorized by the Ordinance

and Act of Assembly of 1816, referred to in the Charter and made part of it, "to contract with the Company for lighting the whole of the streets of the city with gas at his discretion," and the Company was bound by said Act to perform the duties therein imposed.

Nor did they, as the Plaintiff in Error contends, "have the entire freedom of all fair rivalry through the superiority of their gas, or the greater facilities offered to consumers, by which the latter may be attracted from one to the other."

What rivalry could there be, or what effort to get customers through superiority of gas or greater facilities could result, from a contract which provided for the division of the net receipts for all gas supplied in the city, in a certain fixed proportion, and thereby made it a matter of utter indifference to either Company which Company supplied the consumption.

Defendant in Error does contend that a contract between two Corporations of such a character would be void on grounds of public policy, independent of the statute.

AUTHORITIES.

This Court has repeatedly held that contracts whereby Corporations disable themselves from performing their chartered duties, are void as against public policy.

It is necessary to do no more than refer to the familiar cases of

Thomas *vs.* Railroad Co., 101 U. S., 83.
The York, &c. R. R. *vs.* Winans, 17 How., 30.

Both of the above cases were cases of lease of property by railroad Companies. There is no difference in principle, however, between a lease of existing property and franchises, and an agreement not to use an existing franchise. Or if there be a difference, the latter is more strongly opposed to public policy than the former, as likely to result in a total deprivation, as far as the public is concerned, of the benefits attempted to be conferred by the Legislature in granting the franchise.

An analogous case to the one at bar in this respect is found in the case of

St. Louis *vs.* St. Louis Gas Co., 5 Mo. App. 484.

In that case the Gas Co. had been granted a legislative monopoly of supplying gas to the city of St. Louis, and made a contract with another Gas Co. not to do so in a certain district of the city, which was held void as contrary to public policy.

The case of the Hartford & N. H. R. R. *vs.* N. Y. & N. H. R. R., 3 Robertson, 414, was an agreement between two railroads that one of them would not extend its lines, when the result of such extension would be competition, held void as against public policy.

The case of Morris Run Coal Co. *vs.* Barclay Coal Co., *supra,* which was a pooling agreement between Coal Companies, and held void as against public policy, because it left the public at the mercy of the combination as to quantity to be furnished and price to be paid for a necessary of life. The fact that in that case the Companies agreed to divide the market, and each supply a certain assigned portion of the demand, instead of dividing the net profits as in the case at bar, makes no difference in the principle.

The case of Staunton *vs.* Allen, 5 Denio, 435, was the case of a contract made by canal boat owners, whereby the profits of the business were pooled and divided in a fixed proportion. The Court held the contract void as against public policy, saying that the effect of it was to give the members "an increase in proportion to the number of shares they hold, and not according to their merit and activity in business, and safe against the reduction of compensation that would otherwise follow mean accommodations and want of skill and attention, the public interests must necessarily suffer grievous loss. Indeed the consequence of such a state of things would shortly be, that freights and passengers would be ill served, just in proportion as the carriers were well paid."

So in the case at bar the Companies, by this contract being safe from loss of customers, would be well paid just in proportion as they ill served the public.

III.

But whether the agreement was illegal or not on grounds of public policy, it was expressly forbidden by the statute amending the charter of the Equitable Gas Light Company, and thereby declared void.

The fourth section of that statute, which was offered in evidence by the defendant, provides, "That said Company be, and hereby is prohibited from entering into any consolidations, combinations or contracts with any other Gas Company whatever, and any attempt so to do, or to make such combinations or contracts as hereby prohibited, shall be utterly null and void."

It is to be observed in this connection that the 14th Section of the original Act whereby the Equitable Gas Light Company was incorporated, reserves to the Legislature the power at all times to alter, amend or repeal the charter thereby granted, and the same power is expressly reserved to the Legislature by Section 48, Article 3, of the Constitution of the State of Maryland, in force at the passage of the Act, so that acceptance of the amendment, by the Equitable Gas Company was unnecessary.

Sinking Fund Cases, 99 U. S. 719.
Pennsylvania College Cases, 13 Wall. 213.

The Defendant in Error submits that it needs no argument to show that the agreement found in the record was in direct controvention of the above statute. And it appearing from the record that the Plaintiff is seeking compensation for services alleged to have been rendered to the defendant, as its agent in procuring the making of the said agreement by the Equitable Gas Company, he is in the language of this Court in the case of Irwin *vs.* Williar (110 U. S. 510) one who "brings the parties together for the very purpose of entering into an illegal agreement is *particeps criminis*, and cannot recover for services rendered or losses incurred by himself in forwarding the transaction."

We are aware of the large class of cases in which the objection to the contract, unavailingly made by the Corporation, was that it was merely *ultra vires*, in the limited sense of that

term. The term is, however, used rather loosely by the Courts to express two very different things. Of course every illegal and unlawful act done by a Corporation, or indeed by any one, is *ultra vires*, but every act *ultra* the express or implied powers of a Corporation is not illegal in the strict sense of that word.

Thus where the corporate act is not either *malum prohibitum*, or *malum in se*, but is merely in excess of its express or implied corporate powers, the Courts will not declare the act void so as to work injury or injustice to an innocent third party, or so as to allow any one to receive an inequitable or wrongful advantage. The general doctrine of the Courts in this class of cases is expressed by this Court in

Salt Lake City *vs.* Hollister, 118 U. S. 256,

as follows: "In cases where Corporations have been sued on contracts the enforcement of which they have resisted because they were *ultra vires*, the Courts have gone a long way to enable parties who have parted with property or money on the faith of such contracts to obtain justice by recovery of the property or the money specifically, or as money had and received to the Plaintiff's use."

So also where the act is not *malum in se*, but is merely forbidden by the charter of the Corporation, but it does not appear that the Legislature meant that it should be void, the Courts will not declare it so after it has been executed, and valuable rights have been acquired on the faith of it. Such was the case in

Nat. Bank *vs.* Matthews, 98 U. S. 625,

where this Court quotes the language of Sedgwick, "Where it is a simple question of authority to contract, arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted in an action founded upon it to question its validity."

But on the other hand, when the contract is either *malum in se*, or in *direct* violation of a statute prohibiting the making of such a contract, which statute also declares it null and void, no case can be found where any Court has held that any rights can grow out of such a contract.

None of the cases in any way overrule the maxim "*ex turpi causa non oritur actio.* To quote the language of this Court in

Harris & Runnels, 12 Howard, 83.

"There is no doubt that '*assumpsit*' cannot be sustained upon a contract which has not a sufficient consideration. It must not be of an illegal or an immoral tendency, or contrary to sound policy. The common law maxims are *ex turpi causa, non oritur actio—ex dolo malo non oritur actio.* It prohibits every thing which is unjust or *contra bonos mores.*

"The object of all law is to repress vice and to promote the general welfare of society; and it does not give its assistance to a person to enforce a demand, originating in his breach or violation of its principles or enactments. Contracts in violation of statutes are void; and they are so, whether the consideration to be performed, or the act to be done, be a violation of the statute."

So also in the case of Craig *vs.* The State of Missouri, 4 Peters, 436, it is said "it has long been settled that a promise made in consideration of an act which is forbidden by law is void."

In the case at bar the promise is an implied promise to pay for services rendered in bringing about an act which was prohibited by law, and the act and any attempt to commit it, declared void.

Can a Court enforce such a promise? To quote the language of this Court in

Bauhn *vs.* Owens, 2 Peters, 539.

"The answer would seem to be plain and obvious, that no Court of justice can in its nature be made the handmaid of iniquity.

"Courts are instituted to carry into effect the laws of a country; how can they, then, become auxiliary to the consummation of violations of law?

"To enumerate here all the instances and cases in which this reasoning has been practically applied, would be to incur the imputation of vain parade.

"There can be no civil right where there can be no legal remedy; and there can be no legal remedy for that which is itself illegal.

"In the case of Aubert *vs.* Maze, 2 B. & P. 374, it is expressly affirmed that there is no distinction, as to vitiating the contract, between *malum in se* and *malum prohibitum*. And that case is a strong one to this point, since the contract there arose collaterally out of transactions prohibited by statute.

"So the same doctrine was maintained in equity upon a similar contract in the case of Watts *vs.* Brooks, 3 Ves. Jr. 612, in which the Court observes: 'There is nothing immoral in this transaction, but it is against a prohibitory statute. I doubt a little the policy of the act, but I cannot allow it to be argued that you can break a law covertly. The Court will not execute these contracts.'

"So, in the case of Webb *vs.* Pritchett, 1 B. & P. 264, where the action was by a tavern-keeper, against a candidate, for provisions furnished to the voters at an election, contrary to the statute of William. Although the statute does not declare the contract void, the Court declared it void, and in this explicit language: 'This action is apparently founded on a contract to disobey the law.' 'The defence set up proves the principle of the contract.' 'Then, how shall an action be maintained on that which is a direct violation of a public law? The contract is bottomed in *malum prohibitum*, of a very serious nature, in the opinion of the Legislature; how, then, can we enforce a contract to do that very thing which is so much reprobated by the act?' 'This Court cannot give any assistance to the Plaintiff consistently with the principles which have governed the Courts of justice at all times. Persons who engage in such transactions must not bring their cases before a Court of law,'" &c.

DEFENDANT'S FIRST PRAYER.

The Plaintiff assumes that only the defence on the grounds of public policy was raised by the first prayer of the Defendant, which was granted by the Court, and objects to

the prayer on the ground that it contains an assumption of a disputed fact. We shall examine the latter objection first.

An objection to a prayer or instruction on this ground should be taken in the Court below. It should be matter of special objection made to the Court granting the prayer, or instructions, that it assumes a matter of fact as conceded, which is in fact disputed, so as to give the Court the opportunity of correcting it, and cannot be raised under a general exception to the law laid down in the prayer, or instruction.

If the Court below refuses, on special objection made, to reform the prayer, the objecting party may, by embodying the whole of the testimony in his bill of exceptions, enable this Court to decide whether there was evidence to go to the jury of a state of facts different from that assumed by the prayer.

In the case at bar, for instance, how can this Court determine from this record whether or not there was evidence to go to the jury of any claim on the part of the Plaintiff for compensation for anything else than the procuring of the making of the contract offered in evidence?

But if this be not so, and it should be held that this objection may be raised to the prayer by general exception, we do not see that it any where appears from the record that the Plaintiff claimed compensation for anything else than the procuring of the making of the contract offered in evidence.

It will be seen by the record that his declaration contained only the common counts in *assumpsit*, and that he was required to file a bill of particulars.

A bill of particulars, under the Maryland *practice*, must contain a full statement of the Plaintiff's claim, and he can offer evidence of no other claim than therein contained without amendment.

The bill of particulars filed by the Plaintiff (Rec. pg. 3) was in these words:

"THE CONSOLIDATED GAS CO. OF BALTIMORE CITY,

"To W. W. GIBBS, Dr.

"For services rendered by me at your request in negotiating and consummating an arrangement and settlement of

differences between the Consolidated Gas Co. of Balto. City and the Equitable Gas Light Co. of Balto. City, between July 1st, 1884, and Nov. 1st, 1884, $50,000.00."

We thus see that what he claimed compensation for in the pleadings was for "services in negotiating and consummating an arrangement and settlement of differences." If such "arrangement and settlement" was "consummated" by the making of a contract brought about by his "negotiations," we cannot see that the Court misstated his claim when in Defendant's first prayer it said it was for "the procuring of the making of the contract."

What was the evidence? The bill of exceptions (Rec. pg. 4) shows that the very first thing the Plaintiff offered in evidence was the contract, and that he then proceeded to prove (Rec. pg. 7) that, being interested in having the price of gas in Baltimore raised, which he suggested to the President of the Equitable Gas Co., and was then employed by him to bring that about. That he therefore visited Baltimore and opened negotiations with the Defendant, which were carried on for some time, and "resulted finally in the agreement" (contract) above mentioned.

That he informed the Defendant that he was to be paid by the Equitable Co., "and that if he should be successful in bringing about a settlement satisfactory to the Defendant also, he should expect and claim to be compensated by the Defendant likewise."

Was it not, then, for services in bringing about a settlement that he claimed to be paid? And if that settlement was by written agreement, or contract, was it not for "bringing about" that contract he claimed compensation? And is there any difference between the words "bringing about" and "procuring the making of?"

The bill of exceptions shows that the only thing he did was by negotiations to "bring about," or "procure the making" of the contract offered by him in evidence. If it was not for this he claimed compensation, we are at a loss to know what he is suing for.

But, says the Plaintiff, (Plfs. brief, pg. 28) the phrase "procuring the making of the contract" means, of course,

procuring the making, not by the Defendant, but by the Equitable Company, and therefore assumes that the Plaintiff only claims compensation from the Defendant for procuring the Equitable Company to make the contract.

For what else could he claim compensation from the Defendant ?

He claims to have been the agent of both Companies. First employed by the Equitable, with promise of pay if he brought about a settlement satisfactory to that Company, and afterwards employed by the Consolidated Company, with implied promise of pay, if he should bring about a settlement satisfactory to it.

For what was the Equitable to pay him? For inducing or procuring the Consolidated Company to make a settlement satisfactory to the Equitable.

For what was the Consolidated Company to pay him ? For inducing or procuring the Equitable to make a contract satisfactory to the Consolidated.

Surely he cannot claim that the Consolidated agreed to pay him $50,000 for inducing or procuring it to make a contract which was satisfactory to itself.

The case set up by the plaintiff is a promise by each of these Companies to pay him for negotiation with the other, whereby a contract satisfactory to it should be obtained, and there is no evidence to the contrary in the record.

QUESTIONS OF LAW RAISED BY DEFENDANT'S FIRST PRAYER.

The first prayer of the Defendant raised the question whether or not the contract was illegal or void either for reasons of public policy or by reason of the statute.

We are at a loss to see why the Plaintiff assumes that it raised the question of public policy only.

It was intended, and did, ask the Court to hold that the contract was illegal and void, both because opposed to public policy and because in direct contravention of the statute ; and that, therefore, the promise set up by the Plaintiff was not enforceable

1st. Because made in consideration of procuring the doing of an act contrary public policy;

2nd. Because in consideration of procuring the doing of an act contrary to a prohibitive statute;

3rd. Because of failure of consideration, the contract being declared null and void by statute, and any attempt to make such a contract being also declared null and void.

PLAINTIFF PARTICEPS CRIMINIS.

But the Plaintiff in Error objects that the doctrine of *Irwin & Williar* only applies to an agent, "who brings the parties together for the very purpose of entering into an illegal contract," which he claims is not the case here, because he had no object in promoting an unlawful contract, and no knowledge that the contract he did bring about was unlawful.

It seems to us, on the contrary, that, it makes no difference what the Plaintiff's object or knowledge was, if he did bring about an unlawful act, he cannot claim compensation for so doing.

But did he not have knowledge? He "carried on [the negotiations] by proposition and counter proposition," which "resulted finally in the agreement." He must then have known the provisions of the agreement on which he finally brought the parties together, and is legally presumed to know that they were unlawful, whether such illegality resulted from their being contrary to public policy, or from statutory prohibition.

It is doubtless true that an agent may recover for services rendered in the bringing about of a contract legal on its face, and which is only illegal because of the intention of the contracting parties to violate the law under cover of the contract, to which intention the agent may not be privy. As for instance an agent might recover for services in procuring a lease of a building from one to another, though the lessor, and lessee knew that the latter intended to use the premises for gaming. But if the lease on its face provided that the premises were to be so used, it would not be seriously contended that he could recover.

In the case of the Gas Company *vs.* Turner, 5 Bing. N. S. 674, a lease was declared void, because both lessor and lessee knew that it was to be used in violation of an act of Parliment which prohibited the boiling of tar, etc., in any building within seventy feet of any other building, although the lease itself made no reference to this illegal purpose. For services in securing such lease, no doubt an agent could recover; but could he do so if the lease set forth in distinct terms that it was made for the doing of that which was forbidden by the statute.

In this case the making of the contract was itself the illegal, and void under the statute regardless of its provisions, and its provisions rendered illegal and void as being contrary to public policy.

RIGHT OF THE DEFENDANT TO THIS DEFENSE.

The Plaintiff in Error objects to the right of this Defendant to set up this defense. In addition to what has been said it would perhaps be sufficient to quote the language of Lord Mansfield cited by this Court in Harris and Runnels: "The objection that a contract is immoral or illegal as between Plaintiff and Defendant, sounds at all times very ill in the mouth of a defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded on general principles of policy which the Defendant has the benefit of contrary to the real justice as between him and the Plaintiff."

But the plaintiff says the special iniquity of the defence in this case results from the fact that "it is an executed agreement to the stipulations of which with the contracting parties have cheerfully submitted, and under which they have carried on their business."

This statement is supported by nothing in the record, and as matter of fact, it was not acted on partially, and for a very short time and then altogether abandoned.

The learned counsel for the Plaintiff in Error refers to the passage of the Acts of 1886, chapters 384 and 395, as bearing on the question of the public policy of Maryland. It

may also be noted in this connection, that by the Act of 1888, chapter 322, it is provided that gas companies shall not charge more than one dollar and a quarter for gas, and that they shall always furnish to consumers gas of not less than twenty candle power. So that now, if a monopoly be established by the consolidation of gas companies, yet as the price beyond which the monopoly may not go and the standard as to quality of gas below which it cannot go are fixed by law, such a monopoly would be a *regulated* monopoly, without those powers for oppression and abuse which have always made monopolies odious.

And all this shows that the policy of the State of Maryland has always had for its object the *protection of the consumers.*

To secure this at the time when this contract was made, the State had endeavored to prevent monopoly by inviting the freest competition.

Finding that this was ineffectual by reason of the facility with which companies could consolidate and combine, it passed the Act of 1882, chapter 337, prohibiting the consolidation or combination of the Equitable Gas Company with any other; and, finding this also ineffectual, it has at last fixed the price that may be charged and the quality of gas that must be furnished. The policy has always been the same, the laws to enforce it have been changed from time to time according as it has been found that ingenuity could successfully evade existing laws.

No further discussion of the rejected pravers is considere necessary here.

The law of assumpsit for work and labor, with which the brief of the Plaintiff in Error concludes, is of course not called in question. But it is respectfully submitted that it does not fit the plaintiff's case.

There can be no implied contract where there is an expressed contract.

That is to say, where the parties speak for themselves the courts will not speak for them. It is difficult to see how the notification of the plaintiff to us that he would expect pay

from us should be allowed any more weight than our notification to him that he need expect nothing of the kind.

In reference to the technical nature of the defense there is this to say, according to the evidence of the plaintiff himself, and the concession of his own prayers, he not only was not employed by the defendant to perform the services for which he claims compensation, but the defendant actually refused to employ him. It appears from his own evidence that he did not do an hour's labor that he had not already bound himself to do by contract with the Equitable Gas Co., prior to the time when he informed the defendant that he would expect pay from it also.

The evidence of the defendant tended to show that at that time, at once, he was informed by the defendant "that it denied his right to claim any compensation from it, he being the agent of the other company" and that the defendant's committee "would not agree to pay him anything whatever, but it must be left to them when the matter should be completed whether they would give him anything or not; and that if they should conclude to give him anything at all, it would be as a gratuity; and they would not recognize any obligation to give him anything."

When, after the contract was executed, the Plaintiff in Error presented a bill for the enormous sum of $50,000, and on a refusal by the Defendant in Error to consider it, resorted to law, the Defendant in Error felt justified in opposing to the claim any defense which was open to it under the law.

R. D. MORRISON,

N. P. BOND.

Attorneys for the Defendant in Error.

130-412

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. ~~751.~~ 446

WILLIAM H. ROBERTSON, COLLECTOR OF THE PORT OF NEW YORK, PLAINTIFF IN ERROR,

vs.

LOUIS A. SALOMON AND CHARLES SALOMON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 13, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 751.

WILLIAM H. ROBERTSON, COLLECTOR OF THE PORT OF NEW YORK, PLAINTIFF IN ERROR,

vs.

LOUIS A. SALOMON AND CHARLES SALOMON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Louis A. Salomon & Charles Salomon, plaintiffs, and William H. Robertson, defendant, a manifest error hath happened, to the great damage of the said William H. Robertson, as by his complaint appears, we being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and eighty-six, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the seventh day of September, in the year of our Lord one thousand eight hundred and eighty-six.

[Seal of U. S. Circuit Court, South. Dist. of New York.]

TIMOTHY GRIFFITH, *Clerk.*

The foregoing writ is hereby allowed.

WM. J. WALLACE.

2 [Endorsed:] 9449. U. S. Supreme Court. William H. Robertson, plaintiff in error, against Louis A. Salomon & ano., defendants in error. Writ of error. Stephen A. Walker, attorney for plaintiff in error. U. S. circuit court. Filed Sep. 8, 1886. Timothy Griffith, clerk.

Service of a copy of the within writ of error is hereby admitted this 8 day of September, 1886.

TREMAIN & TYLER,
J. S. D.,
Attorneys for Def'ts in Error.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from

one to seventy-six, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of William H. Robertson, plaintiff in error, against Louis A. Salomon & ano., defendants in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this twenty-fourth day of September, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and eleventh.

[Seal of U. S. Circuit Court, South. Dist. of New York.]

TIMOTHY GRIFFITH, *Clerk.*

3 *Summons.*

The Superior Court of the City of New York.

LOUIS A. SALOMON and CHARLES SALOMON, Plaintiffs,
against
WILLIAM H. ROBERTSON, Collector of the Port of New York, Defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiffs' attorneys within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, Nov. 17, 1884.

TREMAIN & TYLER,
Plaintiffs' Attorneys.

Office and post-office address: No. 167 Broadway, New York city.

4 (Endorsed:) New York superior court. Louis A. Salomon and Charles Salomon, plaintiffs, against William H. Robertson, collector of the port of New York, defendant. Summons. Tremain and Tyler, plaintiffs' attorneys. Office and post-office address, 167 B'dway, N. Y. city.

Service of a copy of the within summons is hereby admitted.
N. Y., Nov. 18, 1884.
(S'g'd) GEO. W. PALMER, *D. C.*

5 *Notice of Appearance and Demand.*

N. Y. Superior Court.

LOUIS A. SALOMON & Ano. *versus* WILLIAM H. ROBERTSON.

You will please take notice that I am retained by and appear as attorney for the defendant in this action, and demand service of a

bill of particulars of the plaintiffs' claim herein, and a copy of the complaint and all papers in this action, upon me, at my office in the Unite l States court and post-office building, in the city of New York.

Yours, ELIHU ROOT,
United States Attorney, Attorney for Defendant.

New York, Dec. 4, 1884.

To Messrs. Tremain & Tyler, attorneys for plaintiffs.

6 [Endorsed:] 9449. N. Y. superior court. Louis A. Salomon & ano. *versus* William H. Robertson. Notice of appearance. Stephen A. Walker, United States attorney, attorney for defendant.

Due service of a copy of the within notice is hereby admitted. Dated the — day of ——, 188–.

——— ———,
Plaintiffs' Attorneys.

To Messrs. Tremain & Tyler, plaintiffs' attorneys.

7 SOUTHERN DISTRICT OF NEW YORK, } ss:
City and County of New York, }

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

To the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit:

William H. Robertson, petitioner and affiant, respectfully showeth that he was, prior to the commencement of the suit hereinafter referred to, collector of the customs for the port and district of the city of New York, duly appointed according to law, and that on or about the 18 day of November, 1884, a suit was commenced against him by Louis A. Salomon and Charles Salomon in the superior court of the city of New York for or on account of acts done by him under the revenue laws of the United States and as such collector, and that he has been served with process in said suit in said southern district, and that no trial has been had in said cause.

He therefore prays that, in pursuance of the act of Congress in such case made and provided, the said cause so commenced in the said superior court may be removed therefrom and entered on the docket of this honorable court and thereafter proceeded in as a cause originally commenced in this court.

And he will every pray, etc.

And, being duly sworn, deposes and says that the matters hereinbefore set forth are true to the best of his knowledge, information, and belief.

(S'g'd) W. H. ROBERTSON.

Sworn to before me this 9th day of December, A. D. 1884.
(S'g'd) E. N. HELLEN,
Notary Public, County N. Y.

I certify that, as counsel for the petitioner, I have examined into the proceedings against him and have carefully inquired into all the matters set forth in the within petition and affidavit, and that I believe the same to be true.

New York, Dec. 10, 1884.

(S'g'd) ELIHU ROOT,
U. S. Attorney, Counsellor of the said Circuit Court.

8 [Endorsed:] 9449. U. S. circuit court. Louis A. Salomon & ano. — Wm. H. Robertson, collector of customs at the port of New York. Petition to remove cause. Elihu Root, United States attorney, attorney for defendant. U. S. circuit court. Filed Dec. 12, 1884. Timothy Griffith, clerk.

9 The President of the United States of America to the judges of the superior court of the city of New York, Greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause commenced before you against Edward L. Hedden, defendant, by Louis A. Salomon & ano., plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 17 day of December, 1884, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness Morrison R. Waite, Esquire, Chief Justice of the Supreme Court of the United States, the 12 day of December, in the year one thousand eight hundred and eighty-four.

[L. S.] (S'g'd) TIMOTHY GRIFFITH, *Clerk.*

ELIHU ROOT,
United States Attorney, Attorney for Defendant.

10 [Endorsed:] 9449. U. S. circuit court. Louis H. Salomon & ano. *vs.* William H. Robertson. Certiorari. Elihu Root, U. S. attorney, attorney for defendant. *Elihu Root, United States attorney, attorney for defendant.* (File-mark): U. S. circuit court. Filed Dec. 15, 1884. Timothy Griffith, clerk.

I hereby depute John E. Dowley to serve the within writ.

Dated December 12, 1884.

(S'g'd) JOEL B. ERHARDT,
U. S. Marshal.

I have this day personally served upon the clerk of the superior court of the city of New York a duplicate of the within writ, at the same time showing the original.

Dated Dec. 13th, 1884.

(S'g'd) JOEL B. ERHARDT,
U. S. Marshal.

Bill of Particulars of Merchandise Imported by —— ——.

Description of goods.	Whence imported.	Name of vessel.	Date of invoice.	Date of entry at custom-house.	Amount of duty illegally exacted.	Date of payment of duties in excess.	Protest filed.	Date of appeal to Secretary of the Treasury.	Date of Secretary's decision.
Beans	Trieste	Teutonia	Nov. 26, 1883	Jan. 15, 1884	182 20	Jan. 15, 1884 and April 28, 1884	April 28, 1884	April 28, 1884	August 22, 1884
	Trieste	Golden Horn	Feb. 13, 1884	March 21, 1884	455 40	March 21, 1884 and May 9, 1884	May 9, 1884	May 9, 1884	August 22, 1884
	Trieste	Guildford	Nov. 15, 1883	Dec. 17, 1883	273 20	Dec. 17, 1883 and May, 1884	May 20, 1884	May 20, 1884	August 22, 1884

Plaintiffs' bill of particulars referred to in the foregoing complaint.
Dated New York, December, 18th, 1884.
(S'g'd)

TREMAIN & TYLER,
Plaintiffs' Attorneys.

12 United States Circuit Court, Southern District of New York.

LOUIS A. SALOMON and CHARLES SALOMON, Pl'ffs,
against
WILLIAM H. ROBERTSON, Collector of the Port of New York, Def't } No. 9449.

The above-named plaintiffs, for complaint in this action, state—

I. That the defendant during the times hereinafter mentioned was collector of the customs of the United States at the port of New York, and that the plaintiffs during said times were copartners in trade, doing business in New York and elsewhere under the firm name of L. A. Salomon & Brother, and in said business imported and entered at the port of New York certain merchandise at the times and by the vessels specified in the plaintiffs' bill of particulars, which is hereby made part of this complaint.

II. That the defendant, as such collector, exacted from plaintiffs, as and for duties on said merchandise, the sums specified in said bill of particulars, to wit, the sum of nine hundred and ten and $\frac{80}{100}$ dollars ($910.80) in excess of the amount required by law, and which said excessive sum the plaintiff, on or about the dates specified in the said bill of particulars, and in order to obtain possession of said goods, were compelled to pay and did pay to the defendant.

III. That plaintiffs filed with the said defendant due and timely protests in writing upon each and every entry of said goods against the decision exacting said duties, setting forth distinctly and specifically the grounds of objection thereto, and also as above stated.

IV. That plaintiffs have made due and timely appeal in each case to the Secretary of the Treasury, whose decision on each appeal has either been rendered within ninety days previous to the beginning of this suit or has been delayed more than ninety days from the date of such appeal on each and every entry.

V. That the said bill of particulars states for each importation separately the date of entry at the custom-house, the precise amount of duty said to have been exacted in excess, the date of payment of said duty, and the filing of said protests, of the appeals to the Secretary of the Treasury and his decision thereon, if any, together with the other particulars required by law.

VI. That the sums so exacted as aforesaid have not been repaid to the plaintiffs and are still due and owing to them.

Wherefore plaintiffs demand judgment against defendant for the sum of nine hundred and ten and $\frac{80}{100}$ dollars ($910.08), with interest thereon from the several dates of payment as they appear on said bill of particulars, together with the costs and disbursements of this action.

(S'g'd) TREMAIN & TYLER,
Plaintiffs' Attorneys.

Office and P. O. address: 167 Broadway, New York city.

13 [Endorsed:] No. 9449. U. S. circuit court, southern district of New York. Louis A. Salomon and ano'r, plaintiffs,

vs. William H. Robertson, collector of the port of New York, defendant. Complaint and bill of particulars. Tremain & Tyler, plaintiffs' attorneys, No. 167 Broadway, New York.

Due and timely service of a copy of the within complaint and bill of particulars is hereby admitted,
Dated New York, Dec. 24, 1885.
(S'g'd) ELIHU ROOT,
U. S. Attorney and Attorney for Defendant.

14 Circuit Court of the United Statate for the Southern District of New York.

LOUIS A. SALOMON and CHARLES SALOMON, Pl'ffs,
versus
WILLIAM H. ROBERTSON, Collector, etc. } No. 9449.

The defendant answers to the complaint as follows:

I. He denies that the true duty or that the true and lawful rate of duty on the goods referred to in the complaint was as stated in the complaint; and he denies that the plaintiffs were compelled to pay or did pay defendant, as collector or otherwise, the sum stated in the complaint or any sum in excess of the amount required by law as duties upon the said goods, or that any sum of money unauthorized by law was exacted as duties on said goods or otherwise.

II. He denies that the plaintiffs filed with defendant any protest or protests in writing in which the grounds of objections to the exaction of duties on said goods were distinctly and specifically stated.

III. He denies that the sum stated in the complaint or any sum is now due and owing the plaintiffs.

IV. He denies that he has any knowledge or information sufficient to form a belief as to whether the goods alleged in the complaint to have been imported at the times therein mentioned were in fact such goods as are described in the said complaint.

15 IX. And, further answering, defendant alleges that all moneys received by him from the plaintiffs in respect of the importations in the complaint alleged to have been made were demanded of plaintiffs and were by plaintiffs voluntarily paid to him in his capacity as collector of customs, as and for duties due the United States on imported merchandise, and were forthwith, before the commencement of this action and before the receipt by defendant of any protest or objection on the part of the plaintiffs, paid over by the defendant, in his official capacity aforesaid, to the United States and placed beyond his control.

X. And, further answering, defendant alleges that all moneys received by him from the plaintiffs in respect of the importations in the complaint alleged to have been made were sums due from plaintiffs to the United States as duties according to the rate of duty imposed by law upon articles of merchandise imported by plaintiffs and assessed with duty, and no other sums than duties regularly assessed and ascertained and liquidated according to law upon the

plaintiffs' entry thereof were collected or received by defendant from the plaintiffs.

Wherefore defendant demands judgment that the complaint be dismissed with costs.

ELIHU ROOT,
United States Attorney, Attorney for the Defendant.

[Endorsed:] U. S. circuit court, southern district of New York. Louis A. Salomon & *als. vs.* W. H. Robertson, collector, etc. Answer. Elihu Root, United States attorney, attorney for defendant. (Filemark:) U. S. circuit court. Filed Mar. 21, 1885. Timothy Griffith, clerk.

16 United States Circuit Court, Southern District of New York.

LOUIS A. SALOMON *et al.*
against
WILLIAM H. ROBERTSON. } N. S., 9449.

The collector of the port having adjusted the amount due to the plaintiffs, under the verdict heretofore rendered for plaintiffs in this cause, at the principal sum of four hundred and fifty-five and $\frac{40}{100}$ dollars ($455.40), and the interest thereon to January 25th, 1886, the date of said verdict, at the further sum of fifty-three and $\frac{69}{100}$ ($53.69) dollars:

Now, in accordance with the stipulation made upon said trial by the attorneys for the respective parties, it is hereby stipulated that the said verdict for plaintiffs be, and is hereby, fixed and adjusted at the sum of five hundred and nine and $\frac{9}{100}$ ($509.09), for which sum the clerk will enter the said verdict accordingly.

(S'g'd) STEPHEN A. WALKER,
U. S. Attorney, for Def't.

17 (S'g'd) TREMAIN & TYLER,
Attorneys for Plaintiffs.

18 At a stated term of the United States circuit court for the southern district of New York, held at the court-rooms, New York city:

Present: Hon. Nathaniel Shipman, U. S. district judge, sitting as circuit judge.

LOUIS A. SALOMON and CHARLES SALOMON
against
WILLIAM H. ROBERTSON.

The issues joined in this cause did come on for trial at the October term, 1885, of this court, to wit, on the 21st, 22d, and 25th days of January, 1886, of said term, before the Hon. N. Shipman, U. S. district judge, sitting as circuit judge, and a jury who were duly empannelled and sworn to try the said issues, and the said parties being represented by their respective counsel and producing their

witnesses and arguments, as more fully appears by the bill
19 of exceptions filed, and the said issues being submitted to the jury after a stipulation of counsel in open court that the verdict be rendered generally for plaintiffs or for defendant, as may be, and that if for plaintiffs the amount thereof shall be adjusted by the collector of the port under the direction of the court, and the said jury having thereupon, after due deliberation, returned into court and rendered a verdict for the plaintiffs, and, as appears by the stipulation of the respective attorneys, dated September 3rd, 1886, the amount of said verdict having thereafter been adjusted at the sum of five hundred and nine dollars — ($509.09), for which sum the said verdict for plaintiffs is now accordingly hereby entered of the date of January 25th, 1886:

Now, on motion of Tremain & Tyler, plaintiffs' attorneys, it is adjudged that plaintiffs, Louis A. Salomon and Charles Salomon, do recover of the defendant, William H. Robertson, the sum of five hundred and nine $\frac{9}{100}$ dollars aforesaid, together with the sum of twenty-one and $\frac{20}{100}$ dollars ($21.20), interest on said verdict
20 from the date thereof, namely, from January 25th, 1886, to the date of this judgment, and the further sum of sixty-two and $\frac{35}{100}$ dollars ($62.35), the plaintiffs' costs as taxed, amounting altogether to the aggregate of five hundred and ninety-two and $\frac{64}{100}$ dollars ($592.64), for which sum this judgment is hereby docketed.

Judgment signed this sixth day of September, 1886.

(Signed) TIMOTHY GRIFFITH, *Clerk.*

(Endorsed:) U. S. circuit court, southern district of New York. Louis A. Salomon and Charles Salomon against William H. Robertson. Judgment roll. Tremain & Tyler, plaintiff's attorneys, 167 Broadway, New York. U. S. circuit court. Filed Sept. 6, 1886. Timothy Griffith, clerk.

21 *Bill of Exceptions.*

United States Circuit Court, Southern District of New York.

LOUIS A. SALOMON and CHARLES SALOMON
vs.
WILLIAM H. ROBERTSON, Collector of the Port of New York. } N. S., 9449.

And afterwards, to wit, on the 21st day of January, 1886, this case came on to be tried before the Honorable Nathaniel Shipman, district judge of the United States for the district of Connecticut, duly assigned to hold this court, and a jury duly empanelled and sworn to try the issues herein.

The parties appeared, by their counsel, Mr. Henry E. Tremain, for the plaintiff, and Mr. Henry C. Platt, assistant U. S. district attorney, for the defendant, and during the course of the trial and before the rendering of the verdict therein the counsel for the defendant did take and allege certain exceptions to certain rulings of

the court, which said exceptions were by the court duly
22 allowed and are hereinafter specifically set forth.

To sustain the issues upon his part the plaintiff introduced evidence tending to show that in December, 1883, and January and March, 1884, by the steamers Golden Horn, Plutonia, and Guilford, he imported certain merchandise upon which he was charged a duty at the rate of 20 per cent. ad valorem by the defendant, then the collector of customs at the port of New York, and paid the same under protest.

The protests, upon said trial, were offered in evidence by the plaintiff- and were as follows:

NEW YORK.

SIR: We hereby protest against your ascertainment, collection, and liquidation of and demand for duties on the importations of merchandise therein mentioned and embraced in our entries as follows: Beans, per str. Golden Horn; date of entry, March 21, 1884; entry No. 37951, claiming that said merchandise is not dutiable as charged by you at the rates of twenty (20) per cent. ad valorem or at ten (10) per cent. ad valorem. We claim that said merchandise
23 should be admitted free of duty, and if not free should not be charged with duty at a rate greater than ten (10) per cent. ad valorem. Your ascertainment, liquidation, and exactions as aforesaid are submitted to under compulsion, and we pay said illegal exactions only for the purpose of obtaining or retaining possession of our goods, and we claim a refund accordingly. You are hereby notified that this protest is intended to apply to all future similar importations, and that the duplicate protest which is herewith submitted for transmission by you to the Secretary of the Treasury is our appeal to him from your decision against this protest and also from your exaction on all such entries in future as fully as if formally made on each entry thereof, and this protest is expressly hereby made to apply to all similar future exactions. In the event that you shall not yet have made your final decision on any of our said entries or respecting said exactions, you are hereby notified to read this protest then in your office, upon rendering final decision of which you are hereby requested to notify us.

24 Respectfully, L. A. SALOMON & BROTHERS,
By TREMAIN & TYLER, *Att'ys.*

Dated New York, May 9, 1884.

(The other protests are in the same form.)

The defendant duly objected to the admission of the protests in evidence upon the ground that the same were invalid and insufficient and did not set forth distinctly and specifically the grounds of plantiffs' objection, as required by section 2931 of the Revised Statutes of the United States.

Whereupon the court overruled the defendant's objection and admitted said protests in evidence; to which ruling defendant duly excepted, and which exception was allowed by the court.

The plaintiff, Charles Salomon, being examined in his own behalf, gave evidence tending to show that the articles imported were the seeds of the field bean which he had frequently seen cultivated in the northern part of Germany, Mecklenburg, and Prussia, and being cross-examined by defendant's counsel that he was an importer of drugs and chemicals, and he identified articles exhibited to
25 him by defendant's counsel as seeds of the field bean; had never known them by any other name. Under plaintiffs' objection he was then asked as to the sample marked Defendant's Exhibit No. 1 the following questions:

Q. What are those articles used for?

A. I really cannot say; of these I have not seen any cooked. I could not say that they are used for that; we only brought in two or three lots, and don't know what they are used for. I have eaten baked beans in a restaurant; I could not say that they are these beans; Boston baked beans are universally used as food; I should say that this kind of beans was ordinarily used as food; this is an accidental importation of beans; my knowledge of beans is not very great; these are the only importations we ever made; I have samples and produce them (marked Plaintiffs' Exhibits 1, 2, and 3); we sold those beans after we imported them to dealers.

Q. What for?

A. That is something I can't tell; we sold them under the name of beans.

26 The plaintiff also produced the evidence of Walter Carr, of the firm of Walter Carr & Company, of the city of New York, whose testimony tended to show on his examination-in-chief that he had been a produce commission merchant for thirty-five years and had been all his life familiar with seeds of various kinds that are dealt in as commercial commodities in this city and elsewhere, such as flaxseed, hemp seed, rape seed, and lentils, clover seed, mustard seed, anise seed, coriander seed, and quince seed, and still a great many more that he could not bring to mind at the moment that are used for various purposes; that vegetables are commercial commodities under the general designation of vegetables. Some of the vegetables that are merchantable commodities are potatoes, onions, cabbage, cauliflower, beets, carrots, and other similar things. Being shown sample, Plaintiffs' Exhibit No. 4, he said he should say that those are green beans, vegetable products, and used as vegetables; that he should not consider the plaintiffs' samples (Nos. 1, 2, and 3) produced in court to be vegetables; that they are the seed of the plant from the field bean.

27 Q. What is the commercial or merchantable distinction, if any, between the commodities commercially classified as vegetables and seeds?

Answer. Vegetables are the edible roots and tops of plants as distinguished from dried matured seeds.

Being cross-examined by defendant's counsel he answered that the samples produced are known in trade and commerce as white

beans. He wouldn't call them white seeds, because that is already understood.

Q. Any more than you would call for corn seed?

A. It is a seed, nevertheless.

Q. Isn't corn seed the seed of the corn plant just as much as this seed is the seed of the bean plant?

A. Undoubtedly.

Q. And wheat and rye?

A. No doubt of that. The general designation of this sample when they are bought and sold is, for convenience sake, beans—the same as we say corn or rye without adding the term seed. That witness has raised beans, in a garden and out of it, in New York State. Some beans are grown in the garden, but they are not usually of the kind grown out of the garden.

28 Being shown Exhibit No. 4, he said: "I see the immatured seed here; that is a green bean." It is not in the same state as it is when it is dried; both are used for eating, but they make a different dish altogether.

Redirect examination:

There are various kinds of beans besides those indicated by plaintiffs' samples of the green beans. The string beans are used as a vegetable, and lima beans, but lima beans are dried. The beans in question (plaintiffs' samples) are the product of the field bean. String beans and lima beans are different from these, although the lima bean is grown very largely in fields. The term seed has no special signification in trade. It is a very general term. We say clover, timothy, flax without adding the word seed. It is a general or popular term.

Recross:

When seed is referred to in the trade it does not always refer to something to be planted in the ground.

Q. When you refer to timothy seed and clover seed does not that refer to something to be sown or planted in the ground?

29 A. Yes, sir. When we refer to timothy seed, clover seed, I understand is often used for other purposes.

Q. When you attach the word seed to corn, or wheat, or rye, or any other article of that kind don't you refer to the use to which the article is to be applied, to wit, to be planted or sown?

A. Well, if a person says he wants it for seed to plant, then, of course, I should know it. In talking of corn or rye or wheat we do not usually use the word seed with it.

Q. Does not the word seed when used refer to the use to which it is to be put, to wit, to be planted or sown?

A. It is so seldom used that I can hardly answer that question; it is very seldom.

Redirect:

Some seeds are used for manufacturing purposes. Flaxseed, hemp seed, mustard seed, rape seed, and cotton seed are used for different purposes.

He does not know what apple seeds are used for; quince seeds are used for preparing bandoline.

The plaintiff also produced upon said trial as a witness
30 John P. Deininger, whose testimony tended to show that he was in the produce commission business; that he dealt in everything that grows in the ground—everything that comes from the country; in vegetables at wholesale; fruit and vegetables, according to how they are shipped to him; sometimes in large quantities and sometimes smaller—about twenty years; they are shipped to him mostly from the South and mostly from Jersey; vegetables from the South are mostly small fruit from Jersey.

Q. Tell the jury what vegetables are.

A. Potato is a vegetable, beet is a vegetable, turnip is a vegetable, and some call tomatoes a vegetable, and there are some of those kinds called soup vegetables, but there are many kinds of vegetables. He would call the plaintiff's samples ripe white beans.

Q. What is the difference between beans and vegetables?

A. I have never known that a bean was a vegetable, not even the pod, not to my knowledge; I never sold them as such, and
31 never thought they were. In the price currents in the trade for vegetables beans and peas are designated by themselves and not under any other heading, not in the vegetable list.

On cross-examination by defendant's counsel he said: I have no other name for them than beans and peas.

Q. What are they used for?

A. Sometimes for pork and beans and sometimes to feed pigs with. They are used largely as an article of food for man and beast. We often find them in restaurants. I sell vegetables to make soup of. There is an article of food called bean soup. These beans are used for making bean soup. The green beans—I have seen them in the summer come green, but there are no beans in them; but, in my mind, that does not make a vegetable because they are classified that way. They are beans, of course; we call them beans, but I do not call them beans; still they are sold for beans. There are no beans in them. The plaintiffs' samples we sell as beans and they belong among the serials.

Redirect examination:

32 Lentils are used to eat. Very few are grown in this country, but in Germany. They are a small seed used for eating after being cooked. I have never seen them in this country. They have been imported to sell here—used as beans and peas are, of course. When ripe they are used for the same purpose, excepting they are not used for cattle feed, because they are not planted in such large quantities. When they are dried and the seed of the

lentil is bought and sold they are not vegetables. Under the head of vegetables beans and peas are also sometimes mentioned in summer season; not ripe beans, green beans—green beans, of course, in the pod. They have got to have some heading; it grows in the country, and they put it under the head of vegetables. The plaintiffs' samples here are dried beans and under the head of beans.

Recross-examination by defendant's counsel:

Q. Will you look at that bill of fare. Under the head of
33 beans do you see any baked beans there under the head of vegetables?

A. Yes; I see baked beans.

Objected to. Excluded. Exception by defendant.

Q. So that beans are sometimes classed as vegetables at this time of the year?

Objected to. Excluded. Exception by defendant.

The WITNESS: Yes, sir; baked beans are made into soup; then they are called such when you call baked beans soup.

Redirect:

Q. They are not called vegetables for the purposes of commerce?
Ans. Of course not. Baked beans are never called vegetables.

Plaintiff also produced as a witness Dr. Martin E. Wallstein, whose testimony tended to show, in answer to question calling for what scientific experience he had to qualify him to speak respecting botantical products and their distinctions scientifically: I have been a student in the Columbia School of Mines; have graduated at the University of Heidelberg, and studied at the Munich University and at Berlin University, and since 1876 have been in active practice as an analytical chemist, and have had experience both in botany
34 and in general merchandise.

Q. Will you please state to the jury what, if anything, is the distinction between vegetables and their seeds?

To this question the defendant's counsel objected, as it referred to the scientific distinction; which objection the court overruled, and the defendant's counsel duly excepted.

Answer. Vegetables are plants, edible plants, containing from eighty to ninety per cent. of water, more or less, with albumenoids of various kinds, starchy products and some salts. Seeds are the products of plants containing principally starchy matters, albumenoids, and from nine to thirteen per cent. of water. That is the scientific difference. There is authority for that proposition in the literature of botanists. I have here Musprat's Technical Chemistry; the edible nourishments written by Stormain. He is recognized in Europe as one of the authorities on articles of nutrition. In the articles of nutrition he classifies the edible vegetables or edible plants into three distinct groups.

35 The first group he calls seeds and kernels, among which are enumerated peas of the various kinds and beans. The average composition of this is the minimum of water, being 7.52; the maximum, 12.80; the amount of albuminoids—the most important part for the nutrition—is, minimum, 20.88; maximum, 26.05. The fatty constituents are, the minimum, 1.85, and the maximum, 2.46. The attractive matters free of nitrogen, such as starch, sugars, mineral salts, and others, contain the minimum 55.35 and the maximum 57.46. The fibres contain a minimum of 3.11 and the maximum 3.71. The ash ranges approximately at 2½ per cent. That is the first group under which beans is classified.

The next group are the tubers, such as onions, potatoes, beets, and so on. There the great difference is that instead of having up to thirteen per cent. of water, maximum, they contain as high as ninety-three and some odd per cent. of water. They contain the albuminoids and starch, the only true nourishing parts of the seeds.

36 They contain—the highest is three per cent.; they range as low, however, as below one per cent. The sugars and other extractive matters range from three per cent. up to twenty per cent.

The third class are what are termed in every book on the subject as vegetables—the so-called vegetables—such as asparagus, cauliflower, and all kinds of cabbage, carribi, and so on. Now, here the percentage of water ranges from a minimum of about 86.06 to a maximum of 94 per cent. The amounts of fats there in no instance, with the exception of just the leaves of the beans, run above one-half of one per cent. The starch and other matters run up to ten per cent. That is by Storman in Muspratt's Chemistry. There are other books here, but he shows the classification purely and simple, all in conformity with that classification.

It is correct to sum up by saying that the mature seed is dried and is a different product from the vegetable—the plant itself—and different states of maturity and different parts of it.

37 On cross-examination the witness testified: The title of the work is Muspratt's Technical Chemistry, written in German, of which there is an English edition. These plants belong to the leguminosæ, classified as such. Legume and leguminosæ are two different things entirely. If you wish to have the scientific or general definition I can give it. The meaning of the word legume is a substance containing nitrogen—a nitrogeneous matter. The word legume is French and means vegetable—pure and simple—but that is not the scientific meaning.

Q. Is there any classification except in German works?

A. It is classified under the head of legu*mi*nosæ; that is not French; it is Latin, and it is under that head—legume; that the French classified the three different heads that I have specified. I cannot tell what order beans belong to in the Linnean system; they belong to the same system as of all modern botanists. I cannot tell what kind of flowers they bear; I never saw the plant green. I have only seen the product. I can give you the exact description

of them here—that is, what they are termed in all scientific works—or white beans.

By a JUROR:

38 Q. Has that sample been kiln-dried or simply dried (referring to plaintiffs' sample)?

A. I have never prepared any, but, as far as I know, it is dried.

Q. If it was kiln-dried would it propagate?

A. Not if the kiln-drying goes above a certain degree of heat, so as to destroy the germ. These are not so highly dried. I should think those could be used; I do not know. That has not been kiln-dried—simply dried.

By defendant's counsel:

Q. Is the botanical difference between vegetables and seeds simply in the amount of water that they contain?

A. No, sir; I never said that.

Q. I judged so from the testimony; am I right?

A. No; I think you are incorrect. They contain albuminoids and starchy matter in various degrees.

Q. What other difference is there except in the quantity of water?

A. My definition was in giving it as an article of nourishment—not hypothetical at all. My experience with these products goes so far as they pertain to the nourishment of the people—the analysis of the products—and in that nature I claim to be an expert.

39 I am not an expert botanist; I am a chemist; my experience is simply as an article of food; these are edible beans. I have analyzed, but I don't think I have analyzed those; have analyzed those mostly for their oils and albumens and starch. I cannot recall that I have analyzed any of the beans, but my knowledge comes solely from the authorities given on their products from the seed. I cannot recall reading the analysis made by Einhoff. I suppose that he made some analysis. If they were shown to me I could say whether they were approximately correct (paper shown). I suppose it is correct. I would not state positively, but I think it is. I would take it to be so from my knowledge as a chemist. There is one item there I do not quite understand, but I suppose it is correct; that item is vegetable animal matter; then it has albumens right behind it. I should place the two together as nitrogeneous matters. This is not a more particular analysis in detail than those I made. If I wanted albumens of certain kinds it would be important also,

40 but it is never regarded. I don't understand what he means by the sentence, "In 3340, ripe beans, are obtained the following substance: Volatile matters, 600." I understand "skins, 386." I don't say that the following is a substantially correct analysis: "Starchy, fibrous matter, 610; starch, 1312; vegetable matter, 417; albumen, 31; extraction soluble in alcohol, 136; gummy matter, 177; earthy phosphates, 37½; loss, 133½; making 3840." I think that is the analysis. I can't say how close it is at all. I have my authorities here. I will try to convert those figures into percentages.

Volatile matter, 600; that I don't understand. Skins, 386; that does not correspond. I have here 3.71 per cent.; that would be about 150 to 175 parts in 3840.

Starchy, fibrous matter, 610; there is another definition that I would like to have explained; no starchy, fibrous matter; that is not a scientific expression and not an analytical expression. I don't doubt that Einhauf was a scientific man.

Starch, 1312; that does not correspond; that would be in
41 3840 parts; that would figure about 55.35, which would be approximately 1900.

Vegeto-animal matter, 417; that is another thing I don't understand, unless he means albuminoids. He says albumen, and unless he means albumenoids—which he might comprise under that head.

Albumen, 31; that doesn't correspond. I have 23.32 per cent., which would be about 800 parts in 3840.

Extractions soluble in alcohol, 136; that might be correct. I don't understand that fact at all. I have nothing under that head.

Gummy matter, 177; nothing under that head, because gummy matter is a very great question.

Earthy phosphates, 37½; that is comprised in the ashes; the ashes here are very much greater.

Loss, 137½; you can't possibly say what that is. I wouldn't accept such an analysis for my own, and I would not give it as my own.

I never made a personal analysis of this kind of bean before. I am, then, unable to state from my own knowledge the exact
42 proportions in these articles. I take authorities for that. I have no experience in raising beans; never planted any. The small quantity of water that I spoke of is one great difference between what I call a vegetable and what I call a seed. That comes by reason of the seed being dried to some extent; the water evaporates.

Redirect:

The ones I examined are not kiln-dried; the propagating elements are still there. Besides being a chemist I have a general knowledge of botany; necessarily so. The authorities correspond, so far as my examination has extended, with the testimony I have given.

The testimony of Alfred Roelker, on behalf of the plaintiff, tended to show that witness' firm of Windmuller & Roelker have imported these articles from various parts of the world, from the Mediterranean as well as from the Baltic and from Bremen, and knew the articles as a commercial commodity; that there are certain classes of these beans which are dealt in; they are known as medium
43 beans, pea beans, and marrow beans, which constitute the largest part of the beans which are dealt in. They come from Hungary, Turkey, and the eastern part of Germany, and they did come here by thousands of bags and ship-loads when the article paid to bring it here within two years. Now, it is almost discontinued; that the plaintiffs' samples are seeds of a plant which grows in fields, and after blooming a pod forms, and after it is sufficiently matured

it is dried and then separated from the pod and brought to the market and put into bags and sent to the shipping ports for export. It is thrashed, gathered, and brought to market in large quantities, and is an article of comsumption the world over, an article of commerce used by armies and by navies to a great extent.

And on cross-examination this witness testified: There is a difference between the bean that is grown to be used green and the bean that is grown to be used dried, and there are a great many different kinds of beans; for instance, they have a more fleshy bulb than the bean of which this is a sample. This species of
44 bean is not, to my knowledge, grown in this county in gardens. The beans that are grown in gardens are such as are used green in the markets. These beans are not used that way.

Q. Do you know whether they are grown in this country in gardens or not?

A. I don't know whether somebody does grow them in that way, but they were not intended to be grown in that form.

The testimony of Ignatius M. Scheiner, a witness called on behalf of the plaintiff, tended to show that he was born in Hungary and lived there fifty years and exported beans as an article of food from that country. Beans are produced abroad in Hungary in fields just like corn. They are gathered together by the villagers in the fall of the year. The villagers bring them to the market and the merchants buy at the small farms, and they thus accumulate it in large quantities. I have exported lentils and seen them grow. They grow in open fields, same way as beans; peas also.

The testimony of John Wakeman, a witness produced on
45 behalf of the plaintiff, tended to show that he was a produce merchant of the firm of Wakeman & Company, doing business for the past thirty years in the city of New York, dealing in beans and similar articles. Beans is one of my specialties. We handle a good many. They are the seed of the bean plant and have been an article of commerce for many years. The ground is prepared to cultivate them the same as for corn. They are raised in hills or drills and the field bean is grown on a bush about eighteen inches or two feet high. When full grown they produce a flower, and when they become matured they are sometimes pulled and sometimes cut and left for the sun to cure them in the fields for a certain time, and then they are taken to a barn and thrashed out and carried by the farmers to the market, and there put in barrels or bags and become an article of wholesale trade. Most of the beans that grow in our own State are picked by hand. Take Brockport, for instance, where they handle large portions of them; they have large premises specially adapted for that business, and a large part of the employees are girls, principally to pick the beans over.
46 By picking them over I mean picking out the imperfect beans—what we call the dead beans. The part of the bean that happens to touch the ground becomes discolored, and they are sorted out and are run down elevators, down shutes, into large vans,

and those vans are moving, and the beans are spread out and thinned out and the girls pick them as they go along, and they are dumped off and from there go into barrels and are sent to market. This is about the way they are produced in this country when they become the articles of wholesale trade that I have described. They are raised in large quantities in this State in large fields. I have seen as many as twenty acres with nothing but beans on them. There are other seeds that form a commodity in the produce business for consumption besides the seeds of the bean plant. Peas are the same. They go through the same process and they are also a seed. I suppose wheat is a seed and corn, oats, and barley.

On cross-examination by defendant's counsel:

He don't know this article by any other commercial classi-
47 fication except beans, only as a man mentions a special variety, such as pea beans, marrow beans, kidney beans, China beans, nefugee beans, Mohawk beans. We sometimes sell them under the name of seeds.

Q. Under what circumstances?

A. When a man comes in and asks for some beans to plant I would not like to say that we make a distinction in the character of the article according to the use for which it is intended.

Q. Are they regarded commercially as seeds when intended to be used for reproductive purposes and as produce for food when they are intended to be used as food?

A. I do not know that I really understaud you. In selling these goods it is difficult for us to tell the intention of the buyer. We deal in these goods in large quantities, and they only get to the consumer after they leave us.

Q. Is there that commercial designation?

A. There are beans sold especially in garden seasons here in this city. I would not want to say beans of that character. We do not make a specialty of goods of that class.

Q. Beans how closely resembling them?

A. White beans.

48 Q. Or when beans are sold for garden seeds here?

A. They might be. I don't know positively. I think so.

Q. What is a seed?

A. A bean is a seed; a pea is a seed. There are forty different varieties. Cauliflower, timothy, potatoes are seeds. It is a product of a plant by which that plant is propagated. A seed when it is of certain plants is largely used for food as well as propagation, and in that condition a seed is an article of commerce for both purposes. I think there is no commercial usage within my experience to the contrary of those propositions. When speaking of the commercial name of this article being beans that is a general term that describes all seeds of the bean plant, and it is so accepted in commerce, I should think. When a particular kind of bean is desired that bean is described by its particular name, such as China bean, kidney bean, &c. So far as the bean is an article of importation its chief value is found in its use for consumption. I do

not know of any other way to propagate the bean except from this seed or seed of this character. What you
49 call the garden bean is sold by seedsmen; mostly sold by seedsmen in a smaller way. This is not that article (referring to plaintiffs' samples); there are several different varieties of string beans—several different varieties of garden seed, both in the pod and out of the pod. Those products are used as food, both the seeds and the entire plant, pod and all, of string beans. This article has been dried; has been submitted to a process that makes it an article of general merchandise; has been cured by the sun. We sometimes use lentils; the lentil is, you may say, of the same family as beans. They grow both on the other side and here. I have never seen them grow; they mostly grow in Wisconsin. I have seen the article, however; it is produced in the market. I think they are more like a pea than they are like a bean. This (sample of lentil shown me) is a foreign production, I should think. The lentil we raise here is not so large a size; they grow in a pod the same as beans and peas, and I think are cured in the same way. To the best of my knowledge, beans like these samples before me
50 are not grown in market gardens in this State as an article of commerce. A man might raise half a bushel or a peck, but as an article of commerce they are a product of the fields, so far as my experience extends.

The plaintiff also produced the testimony of I. Augustus Stanewood, whose testimony tended to show that he was in the auditor's department of the custom-house; that it was a part of his usual business to be acquainted with the orders that are given for readjustment of entries protested upon.

Q. Has a statement in this case of Salomon against the collector been made up in the usual course of business under the direction of the Department for a readjustment of these entries at ten per cent. wherever twenty per cent. duties have been paid?

To this question defendant's counsel objected as irrelevant and incompetent.

The court admitted it for the purpose of showing the credit; to which ruling the defendant's counsel duly excepted.

Answer. There has been a statement in this case under the Department's circular.

51 Q. And that circular is a letter dated June 1, 1885, directing the adjustment on entries of this character at ten per cent., is it not?

To which question defendant's counsel duly objected. Admitted.

Answer. Under that circular.

At this point the defendant rested.

The defendant produced as a witness in his behalf James Reed, whose testimony tended to show he was a seedsman with Peter Henderson & Company, of the city of New York, and had been with

them for eight or nine years, doing a large business in the seed line. I know what garden seeds are.

Q. Are these (showing plaintiffs' samples) samples of garden seeds?

A. I cannot say.

Q. White?

A. Well, there are white beans that look very similar to it; my opinion is they are not garden seeds.

Q. Are there white beans of that kind or like those that are grown in gardens?

A. Yes, sir.

Q. Do you know whether the term seed, as used in the trade prior to the 3rd of March, 1883, had any different meaning from
52 the ordinary acceptation of the word—in other words, was there anything which was in fact a seed which commercially was not so regarded?

A. Yes; I think there was.

Q. By way of illustration?

A. Just such beans as these that were imported.

Q. You say commercially those were not known as seeds prior to the act of 1883?

A. Not in the seed trade proper; they would not consider them as such. During the period that I have been with Peter Henderson & Co. I have made myself familiar with the trade classifications and distinctions of the various articles that I deal in so far as they relate to my business, which was the seed business.

Q. Is it true of many of the seeds that you deal in that articles of the same class were used for other purposes than for seed?

A. There are some articles that are used both for seeds and for other purposes, as, for instance, beans, peas, corn to some extent, wheat, and peas of various kinds, used for the purpose of food and manufacturing.

Q. Was it part of your business to make yourself familiar
53 with the use of the terms by those who deal in beans and corn usually, of the articles that you have named, for the purposes of food or manufacture?

A. No, sir; I do not make myself familiar with the distinctions as used by them.

Cross-examination by plaintiffs' counsel:

Q. Has anybody ever come to your store and asked to buy seeds?

A. I think they have; yes, sir. On such occasions, in the ordinary course of business, my first response would be to ask him what sort of seeds he required. If he said beans I would ask him what variety; if peas, the same question; if lentils, I would most likely say I did not have any; we don't keep them. If he asked for the seed of the field bean I would say we have them.

Q. (Showing paper package containing samples of beans.) Look at that and say if you think that would answer such a description?

A. Yes, it might.

Q. You would use them for that, would you not?

A. Yes, probably would.

Q. Would you put them up in a paper on which you would say, if the purchaser does not accept these seeds on these conditions they must be returned at once?

A. I think we would; yes.

54 —. Those (showing same paper package) are the kind of goods that come from Peter Henderson & Co. Does the term seed mean anything peculiar and different in the trade than it does out of the trade?

A. I wouldn't say it did, sir. I can only answer by comparison as to how many bushels, on an average, one bushel of those beans planted as seeds will produce. I would say, perhaps, according to the season, from thirty to fifty bushels to one acre. It would make an average of forty, and they would raise, I should think, from one hundred to one hundred and twenty-five bushels per acre. One hundred bushels of this variety, and I should judge it would take about three bushels to plant an acre, more or less depending upon the quality of the ground and the season and the climate. We sell these articles for any purpose, if a customer wants them. We never inquire the purpose, and I don't know whether it is for manufacturing or for seed unless it is stated by the purchaser. We sell all kinds of seeds.

55 Also the testimony of J. William Ahles, a produce commission merchant, whose testimony tended to show as follows:

I have been a produce commission merchant for the past 15 years, and have had experience as an agriculturist, and know about the product of field beans. The way which I have seen them grow is that they were planted in large fields in rows, the very same as potatoes, and cultivated very much the same way. They grow on bushes perhaps 18 inches high and on which form pods and in those pods the bean. They are allowed to ripen by the sun, and when sufficiently ripe they are pulled off by hand or machine. There are a number of places in New York State where they go into the bean raising very largely. They have machines — piling them on the ground and putting them into rows, and allow them to remain there several days for further drying, and then are taken into barns and thrashed, and sometimes they are thrashed in the fields. After thrashing they are screened and taken to market. A num-

56 ber of large farmers pick their own beans—that is, they pick out any beans that are not marketable and that are off color, a little eaten by grub or something of that kind. I have seen beans similar to these samples shown me grow the same kind of beans—very similar.

Q. Is there any special classification in trade and commerce with the term seeds that differs from its ordinary acceptation?

A. None that I know of particularly. The ordinary acceptation of the term seed is anything from which a plant can be grown. I presume it is the seed of it.

Q. Do you regard a thing as a seed when intended to be used for

reproduction, and cease to regard it as a seed when intended to be used for food?

A. I don't know that I should.

Q. Do you, as a matter of fact, in the trade?

A. Yes; I think I do.

Q. You don't regard the corn that you deal in as such, do you?

A. No; it is sold as corn; we do not know what becomes of it after it is sold, and we don't care.

Q. You know, as a matter of fact, that the principal part of it is used for food?

57 A. We presume it is.

Q. So with rye and oats?

A. Undoubtedly.

Q. So with beans?

A. Yes, sir; I should not think that beans like those samples are grown at all in gardens. If any one grew them once they would not a second time, if they wanted to eat them green; they might grow them, as a great many people do, to get seeds and plant them. A man can raise anything he wants in a garden. I hardly think, as a matter of fact, that beans like these are raised in gardens to be used for something other than in the green state, because they require more room; they could not raise enough of them to make it an object.

Also the testimony of George Dryel, tending to show:

I have been a gardener in New York for 26 years, and know field beans like these (samples); they are cured or dried; they grow in land, same as other vegetables.

Q. Do you grow many of them?

A. No; we don't care for many of them; we cannot get any of them in the market green; we raise some refugees; these (indicating plaintiffs' samples) are raised in Europe. We use beans

58 like those there as seed for gardening, but — not raise them; we raise refugees. They have a different color and are not so much round—are more flat; are more blue; these are white. I raise refugees—eat some—but we bring them here to market green before they are ripe.

Q. Are the seeds like these?

A. No; they are blue; the difference when they are ripe is they might be a little bigger.

Q. The fact that these beans are dried would not prevent them from propagating?

A. No; when they are dried you can keep them as long as you want; they are just as good for seed.

Also the testimony of Henry G. Larowe, a produce dealer of the firm of Ege & Otis, tending to show that he had been in the produce business for fifteen years or over, and deals in beans substantially like the plaintiffs' Exhibits, selling something like 200,000 bushels a year.

Q. For what purpose do you sell them?

A. We sell them principally for consumption as food; they are sold, however, without restriction.

Q. Can you, from the nature of your business, and dealing
59 as largely as you do with them, give us an idea as to the amount that is sold for food, in proportion to the amount that is sold for seed to be planted in the ground?

A. No, sir; I could not give any definite answer to that question.

Q. Can you give your best information—your best belief—about it?

(Objected to.)

A. My best belief is that we sell 100 barrels for consumption to one of seed; at least that; I have no positive knowledge; I deal in about 200,000 per year; have sold more domestic than foreign goods; sell without reference to what the purchasers use them for.

Q. Does it make any difference in trade or commerce what use is to be made of them?

A. Not as far as beans are concerned; I should think it made no difference whatever; the proportions I have given are not my actual knowledge.

The defendant also produced the testimony of Julius M. Fairchild, tending to show:

My business is restaurant; I have been in that business about 18 years, in this city; I keep the International Dining Room, 19
60 Park Row; not such a very large restaurant; do a fair business.

Q. Will you please state to the jury under what class of things edibles belong—the articles commonly known as Boston beans?

Objected to.

(By the COURT:) If you can show any commercial usage, all right.

Q. You are acquainted with the article beans in your business?

A. Somewhat, sir.

Q. Will you look at that sample (showing witness plaintiffs' sample No. 3)?

A. I should call them beans easy enough.

Q. Are those edible beans?

A. The beans that they use are; yes, sir; those are beans; I have seen a great many of them.

Q. And cooked a great many of those in your business?

A. Yes, sir; have them cooked.

Q. In your business and in the business generally in which you are engaged, what are those beans known as?

Objected to. Objection sustained; to which ruling defendant's counsel duly excepted.

Q. Have you bought and sold beans?

A. Yes, sir.

Q. As what—under what name?

(Objected to, but answered.)

61 A. There are several kinds of beans; the beans we use mostly in our business are called the Marrow, and that is the kind I buy mostly.

Q. In what quantities?

A. Oh, I buy them by the bushel sometimes; sometimes by the barrel for cooking.

Q. As an article of food, what is the common name given to those beans?

Objected to as immaterial and irrelevant.

The COURT: I don't think you can prove the commercial designation in that way.

DISTRICT ATTORNEY: We do not desire to prove the commercial designation by this witness, but the common designation.

The COURT: I do not think I can permit that from the testimony. I will exclude that question.

Counsel for the Government excepts.

This witness further testified that he had raised beans in the garden and field both; had raised them in his garden among other vegetables, and sells them cooked as an article of food.

By defendant's counsel:

Q. Under what name?

The question was objected to by counsel for the plaintiff-; which objection was sustained by the court; to which ruling defendant's counsel duly excepted.

62 Also the testimony of Frederick Keith, tending to show that he was the manager of the Astor House restaurant, in the city of New York; that in the Astor House beans are used as food to the extent of about a barrel in ten days. This kind of beans (plaintiffs' exhibits) we use baked, as a rule, and sometimes in soup.

By defendant's counsel:

Q. What are they commonly called when baked?

This question was objected to by counsel for the plaintiff- and the objection sustained by the court; to which ruling of the court defendant's counsel duly excepted.

We boil them and bake them afterwards. We soak them and mash them up when we make them into bean soup.

Also the testimony of Arthur T. Hurd, tending to show that he had dealt extensively in beans, to the amount of millions of bushels, the same articles as those shown to him (plaintiffs' exhibits), with which he is familiar; that they are known as beans, white beans, in trade and commerce, and generally used as an article of
63 food; has seen them in the garden; they are used largely by armies and navies.

Defendant's counsel then moved that the court direct a verdict for the defendant on the ground that there is not sufficient evidence to warrant a verdict for the plaintiff-; which motion was denied by the court, and to which ruling the defendant's counsel duly excepted.

Defendant's counsel then requested the court to charge the jury that if the jury find that the imported articles, edible beans, are not commercially or commonly accorded to the general usage and known denominations of trade, known as seeds, and are otherwise designated and provided for in the tariff act, their verdict should be for the defendant; which request the court refused to charge; to which ruling defendant's counsel duly excepted.

Also that if the jury find that the imported articles are not designated or enumerated in the tariff act, and that they bear a similitude to vegetables, either in material, quality, texture, or the
64 use to which they may be applied, then their verdict should be for the defendant; which request was denied or refused by the court, and to which ruling defendant's counsel duly excepted.

Also that if the jury find that the imported articles are garden seeds that are sometimes planted in gardens and sometimes in fields, and that they are commercially known as garden seeds, then their verdict should be for the defendant; which request the court refused to charge; to which ruling the defendant's counsel duly excepted.

Also that if the jury find that the imported articles are not enumerated or provided for in the tariff act by either the designation of seeds, garden seeds, or vegetables, and if they find them to be raw or unmanufactured articles, then their verdict should be for the defendant; which request the court refused to charge, and to which ruling the defendant's counsel duly excepted.

Whereupon the court charged the jury as follows:

65 *Charge.*

SHIPMAN, *J.:*

GENTLEMEN OF THE JURY: The plaintiffs in this case imported into this port in the years 1883 and 1884, by three different vessels, certain quantities of white beans, upon which the collector levi-d a duty of twenty per cent. as garden seeds. That rate of duty was paid under protest, the plaintiff- insisting that the article was duty free as seeds "not otherwise provided for," and that if not seeds they were dutiable at ten per cent.

The Treasury Department has receded from its position that the articles were garden seeds, and has directed a refund of ten per cent., so that the only question before you is whether they should have been admitted duty free as seeds or should have paid a duty of ten per cent. as vegetables.

White beans are unquestionably the seeds of the field bean, but the Government claims that they are also, in the universal or general definition of the word, vegetables, and therefore come within the term vegetable, which term was in the schedule of the tariff act relating to provisions.

66 This is the only question of fact—are they or are they not vegetables in the ordinary and usual definition of the word? If they are—as white beans are undoubtedly used vastly more for purposes of food than as seeds—they are dutiable at ten per cent.,

and your verdict will be for the defendant, because the plaintiff- concedes that *he is* to credit to the Government the ten per cent. which has — ordered to be refunded.

One witness for the plaintiff-, Mr. Carr, defines vegetables to be the roots or tops of plants, as distinguished from their dried, matured seeds, which would exclude such articles as tomatoes, potatoes, turnips, pumpkins, and cucumbers.

Another witness defines vegetables to be the green product of the plant, making the definition of vegetables depend upon its perishable character, whether green or dry.

The plaintiff- rel*ies* upon the uncontroverted fact that they are seeds, and says that they cannot properly be called vegetables, which *he* would limit to the definition by Mr. Carr. The commer-
67 cial designation of the article or what the article is called in trade and commerce, or the name bean, has nothing to do with the question.

The defendant says that the general definition of the word vegetable, as contained in Webster's Dictionary, is this: "A plant used for culinary purposes and cultivated in gardens or destined for feeding cattle, sheep, or other animals." And the defendant further says that white beans are embraced in this definition of vegetables, and are generally used for culinary purposes, that being their sole use, except the portion used for reproduction; and he says that it is straining a point to call them seeds for tariff purposes, they being, in fact, vegetables.

It is conceded, and I charge you, that a term employed by Congress to designate an article as the subject of duty is to be understood in its ordinary commercial sense, rather than its technical or scientific meaning, where they differ.

I charge you furthermore, as requested by the plaintiff-, that, as various kinds of seeds are used for various purposes and have various names, the circumstances that these articles are edible
68 and as a commodity are a staple article of food is not controlling.

Nor does the fact that the articles are known as beans or white beans or dried beans withdraw them from the classification of seeds, if they are seeds; and if you believe from the testimony that vegetables are the edible roots or tops of plants, as distinguished from their dried, matured seeds, then your verdict will be for the plaintiff-.

Plaintiffs' counsel said: Your honor stated Mr. Carr's definition would exclude a certain article, but we say that if his definition be exactly quoted it would not exclude it, as his language is, "Edible roots or tops of plants;" upon which the court said to the jury: If I did omit anything from the definition your better recollection will supply it.

To that portion of the charge which states "the commercial designation of the article or what the article is called in trade and commerce, or the name bean, has nothing to do with the question" the defendant's counsel duly excepted.

69 Thereupon the jury returned a verdict for the plaintiff-.

And forasmuch as the exceptions, matters, and things afore-

said would not otherwise appear by the record, I have settled, allowed, and signed this bill of exceptions on the prayer of the said defendant by his counsel, and it is ordered that the same be filed as a part of the record herein with like force and effect as if the same had been reduced to writing, signed, and filed before the cause was given to the jury.

Witness my hand, at New York, this 25th day of August, 1886.

N. SHIPMAN, *Judge.*

70 (Endorsed:) N. S., 9449. U. S. circuit court, southern district of New York. Louis A. Salomon and Charles Salomon *versus* William H. Robertson. Bill of exceptions. Stephen A. Walker, United States attorney, attorney for defendant. U. S. circuit court. Filed Sep. 6, 1886. Timothy Griffith, clerk.

71 *Assignment of Errors.*

Supreme Court of the United States.

WILLIAM H. ROBERTSON, Plaintiff in Error,

vs.

LOUIS A. SALOMON & CHARLES SALOMON, Defendants in Error.

Afterwards, to wit, on the second Monday of October, in the same term, before the justice of the said Court, at the Capitol, in Washington, comes the said plaintiff in error, by Stephen A. Walker, his attorney, and says that in the record and proceeding aforesaid there is manifest error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said defendants in error against the said plaintiff in error, whereas, by the law of the land, the said judgment ought to have been given for the said plaintiff against the said defendants.

And the said plaintiff prays the judgment aforesaid for the error aforesaid and other errors in the record and proceedings aforesaid may be reversed, annulled, and altogether held for nothing, and that he, the said plaintiff, may be restored to all things which he has lost by occasion of said judgment, &c.

(S'g'd) STEPHEN A. WALKER,
Attorney for Plaintiff in Error.

72 [Endorsed:] 9449. United States Supreme Court. William H. Robertson, plaintiff in error, *vs.* Louis A. Salomon & ano., defendants in error. Assignment of error. Stephen A. Walker, attorney for plaintiff in error. Due service of a copy of the within assignment of error is hereby admitted this 8 day of September, 1886. (S'g'd) Tremain & Tyler, attorneys for defendants in error. (File mark:) U. S. circuit court. Filed Sept. 8, 1886. Timothy Griffith, clerk.

73 *Joinder in Error.*

Supreme Court of the United States.

WILLIAM H. ROBERTSON, Plaintiff in Error,

ag't

LOUIS A. SALOMON & CHARLES SALOMON, Defendants in Error.

And afterwards, to wit, on the second Monday of October, in the October term, 1886, the said defendants in error, by Tremaine & Tyler, their attorneys, freely come here into Court and say that there is no error, either in the record of the proceedings aforesaid or in the giving of the judgement aforesaid, and they pray that the said Supreme Court of judicature, before the justices thereof now here,
74 may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

TREMAIN & TYLER,
Attorneys for Defendants in Error.

H. E. TREMAIN,
Of Counsel for Defendant- in Error.

(Endorsed:) U. S. Supreme Court. William H. Robertson, plaintiff in error, *vs.* Louis A. Salomon & *al.*, defendants in error. Joinder in error. Service of a copy of the within joinder in error is hereby admitted this 23d day of Sept., 1886. Stephen A. Walker, att'y for pl'ff in error. U. S. circuit court. Filed Sept. 23, 1886. Timothy Griffith, clerk.

75 UNITED STATES OF AMERICA, *ss:*

To Louis A. Salomon & Charles Salomon, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, eighteen hundred and eighty-six, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein William H. Robertson is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated September 7, 1886.

WM. J. WALLACE.

76 [Endorsed:] 9449. U.S. Supreme Court. William H. Robertson, plaintiff in error, against Louis A. Salomon & ano., defend-

ants in error. Citation. Stephen Walker, attorney for plaintiff in error. Service of a copy of the within citation is hereby admitted this 8th day of September, 1886. Tremain & Tyler, J. S. D., attorneys for defendants in error.

Endorsed on cover: S. New York C. C. U. S. No. 751. William H. Robertson, collector of the port of New York, plaintiff in error, *vs.* Louis A. Salomon and Charles Salomon. Filed October 13, 1886.

In the Supreme Court of the United States.

OCTOBER TERM, 1886.

WILLIAM H. ROBERTSON, collector, plaintiff in error,
vs.
LOUIS A. SOLOMON ET AL. } No. 1141.

In the Supreme Court of the United States.

OCTOBER TERM, 1886.

WILLIAM H. ROBERTSON, collector, plaintiff in error,
vs.
LOUIS A. SOLOMON ET AL.
No. 1141.

Comes the Attorney-General of the United States, and presents a copy of a letter from the Secretary of the Treasury, and of its enclosure, showing the importance of this case and the necessity of an early decision therein, and he makes such correspondence a part of this motion, and moves the court to advance said cause on the docket and assign it for argument and submission at an early day.

A. H. GARLAND,
Attorney-General.

TREASURY DEPARTMENT,
December 4, 1886.

The honorable the U. S. ATTORNEY-GENERAL:

SIR: I have the honor to transmit herewith a copy of a letter dated New York, the 1st instant, from Messrs. Tremain & Tyler, in which they request that the suit of Robertson, plaintiff in error, against Solomon, defendant

in error, No. 1141, now on the calendar of the United States Supreme Court, may be advanced for a hearing during the present term of the court.

As the parties state that there are a number of similar suits pending in the courts below, all of which involve the question whether beans are liable to a duty of 10 per cent. ad valorem as vegetables or are free of duty as agricultural seeds under the existing tariff, which a decision in the case in question will be the means of determining and settling.

If it meets with your concurrence I will thank you to comply with the request of the parties, and to move the Supreme Court for an early trial of the said case.

Respectfully, yours,

D. MANNING,
Secretary.

NEW YORK, *Dec.* 1, 1886.

To Hon. DANIEL MANNING,
Secretary of the Treasury:

SIR: We respectfully request that the Treasury Department desire the Attorney-General to cause the case of Robertson, plaintiff in error, against Solomon, No. 1141, on the Supreme Court docket, to be advanced for a hearing during the present term of that court.

The decision of this case will, we believe, dispose of a large number of suits pending in this district, as well as some suits pending in other districts along the Canada frontier. Moreover, the question involved is one of current administration of the revenue. If the decision of the court below be correct, the present course of the Department in exacting ten per cent. duty on various field seeds is erroneous and promotes litigation. The issue is in substance whether the seeds of the field-bean are dutiable at ten per cent. as vegetables, or are exempt from

duty under the free list as *seeds* not specially enumerated. The court, after distinguishing vegetables from their seeds, left it to the jury with a mass of evidence before them to determine to which class the seeds of the field-bean belong, and the jury found that they were free as seeds not enumerated.

A prior jury had decided such seeds not to be *garden* seeds, as the Government at first, under the tariff of 1883, had mistakenly ruled, but the verdict was set aside on motion of the Government because of a mistake in the trial.

If the writ of error is to be prosecuted, we respectfully urge the Government to cause the case to be advanced.

Yours, very respectfully,

TREMAIN & TYLER,
Attorneys for Defendants in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

WILLIAM H. ROBERTSON, COLLECTOR of the port of New York, plaintiff in error,
vs.
LOUIS A. SALOMON AND CHARLES Salomon.
No. 446.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

WILLIAM H. ROBERTSON, COLLECTOR of the port of New York, plaintiff in error,
vs.
LOUIS A. SALOMON AND CHARLES Salomon.
No. 446.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

ABSTRACT OF THE CASE.

Between the 17th of December, 1883, and the 21st of March, 1884, the plaintiffs below made three importations of beans at the port of New York. The collector charged a duty of 20 per cent ad valorem, which the importers

paid under an alternative protest, claiming the goods should not have been taxed at the rate of 20 per cent. ad valorem nor 10 per cent. ad valorem, but should have been admitted free, or at a tax of 10 per cent. ad valorem. Ten per cent. of the duty was ordered to be refunded by the Treasury Department, and 10 per cent. was retained. Suit was brought to recover from the collector so much of the duty paid as was not refunded.

There are two general questions in the case.

First. Is the protest sufficient?

Second. Were the goods on the free list?

SPECIFICATIONS OF ERROR.

(1) The court erred in overruling the objection of the defendant's counsel and admitting the protests, as follows: (Rec. p. 10.)

> The defendant duly objected to the admission of the protests in evidence upon the ground that the same were invalid and insufficient and did not set forth distinctly and specifically the grounds of plaintiffs' objection as required by section 2931 of the Revised Statutes of the United States.

(2) The court erred in overruling the offer of defendant's counsel to prove what was the common name of the import, as set forth in the following exception (Rec., p. 25):

> Q. As an article of food, what is the common name given to those beans?
>
> Objected to as immaterial and irrelevant.

The COURT: I don't think you can prove the commercial designation in that way.

DISTRICT ATTORNEY: We do not desire to prove the commercial designation by this witness, but the common designation.

The COURT: I do not think I can permit that from the testimony. I will exclude that question.

Counsel for the Government excepts.

This witness further testified that he had raised beans in the garden and field both; had raised them in his garden among other vegetables, and sells them cooked as an article of food.

By defendant's counsel:

Q. Under what name?

The question was objected to by counsel for the plaintiff; which objection was sustained by the court; to which ruling defendant's counsel duly excepted.

Also the testimony of Frederick Keith, tending to show that he was the manager of the Astor House restaurant, in the city of New York; that in the Astor House beans are used as food to the extent of about a barrel in ten days. This kind of beans (plaintiffs' exhibits) we use baked, as a rule, and sometimes in soup.

By defendant's counsel:

Q. What are they commonly called when baked?

This question was objected to by counsel for the plaintiff, and the objection sustained by the court; to which ruling of the court the plaintiffs' counsel duly excepted.

(3) The court erred in refusing to affirm defendant's first point, which is (Rec., p. 26):

Defendant's counsel then requested the court to charge the jury that if the jury find that the im-

ported articles, edible beans, are not commercially or commonly accorded to the general usage and known denominations of trade, known as seeds, and are otherwise designated and provided for in the tariff act, their verdict should be for the defendant; which request the court refused to charge; to which ruling defendant's counsel duly excepted.

(4) The court erred in refusing to affirm defendant's second point, which is (Rec., p. 26):

Also that if the jury find that the imported articles are not designated or enumerted in the tariff act, and that they bear a similitude to vegetables, either in material, quality, texture, or the use to which they may be applied, then their verdict should be for the defendant; which request was denied or refused by the court, and to which ruling defendant's counsel duly excepted.

(5) The court erred in refusing to affirm defendant's third point, which is (Rec., p. 26):

Also, that if the jury find that the imported articles are garden seeds that are sometimes planted in gardens and sometimes in fields, and that they are commercially known as garden seeds, then their verdict should be for the defendant; which request the court refused to charge; to which ruling the defendant's counsel duly excepted.

(6) The court erred in refusing to affirm defendant's fourth point, which is (Rec., p. 26):

Also, that if the jury find that the imported articles are not enumerated or provided for in the tariff act by either the designation of seeds, garden seeds, or vegetables, and if they find them to be raw or unmanufactured articles, then their verdict should be

for the defendant; which request the court refused to charge, and to which ruling the defendant's counsel duly excepted.

(7) The court erred in the portion of the general charge included in the following exception (Rec., p. 27):

To that portion of the charge which states "the commercial designation of the article, or what the article is called in trade and commerce, or the name bean, has nothing to do with the question" the defendant's counsel duly excepted.

BRIEF OF ARGUMENT.

I.

The protest is insufficient. It is (Rec., p. 10):

We hereby protest against your ascertainment, collection, and liquidation of and demand for duties on the importations of merchandise therein mentioned and embraced in our entries as follows: Beans, p'r str. Golden Horn; date of entry March 21, 1884; entry No. 37951, claiming that said merchandise is not dutiable as charged by you at the rates of twenty (20) per cent. ad valorem, or at ten (10) per cent. ad valorem. We claim that said merchandise should be admitted free of duty, or if not free, should not be charged with duty at a rate greater than ten (10) per per cent. ad valorem. Your ascertainment, liquidation, and exactions as aforesaid, are submitted to under compulsion, and we pay said illegal exactions only for the purpose of obtaining or retaining possession of our goods, and we claim a refund accordingly. You are hereby notified that this protest is

intended to apply to all future similar importations, and that the duplicate protest, which is herewith submitted for transmission by you to the Secretary of the Treasury is our appeal to him from your decision against this protest and also from your exaction on all such entries in future as fully as if formally made on each entry thereof, and this protest is expressly hereby made to apply to all similar future exactions. In the event that you shall not yet have made your final decision on any of our said entries or respecting said exactions, you are hereby notified to read this protest, then in your office, upon rendering final decision, of which you are hereby requested to notify us.

The statute requires that the importer's protest shall set forth "distinctly and specifically the grounds of his objection" to the liquidation of duty. The objection alledged in the protest may be dependent on facts; or it may be an objection on legal grounds, the facts being free from dispute. If the objection is dependent on facts, the statute requires that the facts which form the basis shall be distinctly and specifically set forth, so that the collector shall not be allowed to act in ignorance of any facts on which the importer may claim to recover back the duty paid. If the importer claims exemption on the ground that in law his import has the right of entry free, he should set forth or refer to the law sufficiently to inform the collector what provision of the law grants his goods that exemption. If the collector has in his mind a clause of the tariff act which he believes is applicable, and the importer has another in his mind that he believes should be applied, unless the importer informs the collector what clause he claims under, the collector has no opportunities

to judge fairly the cause which he is to decide. The importer must put the collector in possession of his side of the case, or he is debarred from the right to dispute the judgment of the collector, and this must be done distinctly and specifically.

It is claimed this is not done in the protest under consideration. Its language, "claiming that said merchandise is not dutiable, as charged, at the rate of 20 per cent. ad valorem or at 10 per cent. ad valorem," does not state any grounds for the claim at all. The next clause must state the ground, if any is to be found. It is, "We claim that said merchandise should be admitted free of duty, and if not free, should not be charged with duty at a rate greater than ten per cent. ad valorem."

This is but an allegation that it should be admitted free, without any reason why. It might be the importers claimed it should be admitted free from the fact they were imported for the Agricultural Department.

It might be they proposed to establish as a fact the importations were beans of a rare kind, not grown in the United States, and were imported expressly as such, or that they were not such beans as are usually planted in gardens; or that by a clause in the free-list they were exempt as seed.

No information at all was given which would direct the attention of the collector to the ground on which the exemption from duty was claimed. To render the ground of exemption still more dubious, the protest claimed that the goods should be taxed neither at 20 nor 10 per cent., and by the next clause of the sentence claims that if not admitted free they should be taxed only 10 per cent.

The requisites of a protest are well stated in Elmes's Law of the Customs, section 714, as follows:

> SEC. 714. They must, however, be so specific in character that when fairly construed they will show that the objection taken at the trial of the suit was in the mind of the importer at the time of making the protest; also that they draw the attention of the collector to the substance of the objection, to the end that he may cure the defect, if any exists. A mere protest against the payment of the duty exacted is not a compliance with the statute, and is therefore insufficient. The importer must do more than this, as is evident from the language of the statute. He must make a clear, distinct, and positive statement of the ground of his objection to the exaction, sufficient to notify the collector of the true nature and character of the complaint against him, in order that the officer may be able to ascertain the precise facts, and to correct the mistake, if one has been made, before it is too late to correct it, or before, it may be, the officers or persons who participated in the transaction are dead or beyond reach, and while the evidence is attainable to confirm the decision, if it is correct. The protest should be, and is required to be, so distinct in stating the ground of objection, that, at the trial of any suit which may ensue for a recovery, it shall definitely appear that the complaint and the ground thereof were patent at the time of protest, and not the result of an afterthought.

A foot-note to this quotation gives references to substantially all the decisions reported bearing on the question.

In the case of *Frazee* vs. *Moffitt* (20 Blatchford, 269) it is ruled:

> A mere protest against the payment of the duty exacted is not a compliance with the statute.

In the case of *Thomson* vs. *Maxwell* (2 Blatchford, 387–8) one of the protests was:

> We also protest against paying add. duty and penalty, the goods being appraised (259, 260) too high; we claim to have $174.80 refunded. * * *

The other protest was:

> The plaintiffs wrote on the entry: "We hereby protest against the payment of 30 *per cent.* duty charged on all cotton and worsted shawls contained in this entry, claiming to enter the same at 25 *per cent.* We pay the amount exacted, in order to get possession of the goods, claiming to have the difference refunded."

The court ruled (p. 392):

> Testing by this rule the protests put in by the claimants in this case, it is obvious that they afford no indication to the collector that he or the other officers of the customs had committed any irregularity in the mode adopted for ascertaining or imposing the duties demanded. We accordingly lay out of view all the allegations made on the argument respecting the regularity of the proceedings at the custom-house preparatory to an appraisal of the goods, and the competency of the oath administered to the appraisers, and the necessity that all the appraisers should act together in examining the goods, and the sufficiency of the report made by them to the collector, or of his directions to them, or of their memoranda upon the invoices or the entries. The protests specify none of these particulars, and the claimants must be held to be debarred of all objections which are not distinctly and specifically pointed out in the protests or made certain by the papers which accompany them.

In the case of *Arthur* vs. *Morgan* (112 U. S., 501) it is ruled:

> A protest is not required to be made with technical precision, but is sufficient if it shows fairly that the objection afterwards made at the trial was in the mind of the party, and was brought to the knowledge of the collector, so as to secure to the Government the practical advantage which the statute was designed to secure.

The protest in this case by the last clause quoted made it an alternative one. It is:

"And if not free should not be charged with duty at a rate greater than ten per cent. ad valorem."

The duty in excess of the 10 per cent. was refunded before judgment. The protest at best claimed they should be free, or taxed at 10 per cent. This gave two alternatives to the Government. One of the alternatives offered by the plaintiffs below was accepted, and, under the protest, the plaintiffs can not lawfully ask more.

II.

The remaining question is, Were the goods on the free list? For if not on the free list, as they were taxed at the alternative rate fixed in the protest, it is immaterial whether that rate was right or wrong. First, because the importer can not recover on any other ground than that set forth in his protest (*Davies* vs. *Arthur*, 96 U. S., 148); second, because the general rule is that all imports from foreign countries shall be taxed. The exceptions to the rule are set forth in the free list, which is an express statutory exception, and all non-enumerated articles not

excepted are provided for in the similitude section (2499, R. S.).

The imports involved in this case after the refund were classified as vegetables under the first of the following clauses of Schedule G (22 U. S. Stat., 504):

> Vegetables, in their natural state, or in salt or brine, not specially enumerated or provided for in this act, ten per centum ad valorem.
>
> Vegetables, prepared or preserved, of all kinds, not otherwise provided for, thirty per centum ad valorem.

The importers claimed on the trial the merchandise should have been admitted free, under the following clause of the free list (22 U. S. Stat., 520):

> Plants, trees, shrubs, and vines of all kinds, not otherwise provided for, and seeds of all kinds, except medicinal seeds, not specially enumerated or provided for in this act.

The clause which immediately succeeds this in the free list is—

> Plants, trees, shrubs, roots, seed cane, and seeds imported by the Department of Agriculture or the United States Botanical Garden.

This last clause throws some light on the former. It shows that when "seed" is used as an adjective, as in "seed cane," and not as a noun, the article is not embraced in the word "seed" as used in the statute, for the words "seed cane" and "seeds" are used together in the same clause, implying that "seed cane" is not embraced in the word "seed."

The inference is that when a vegetable product which

has a specific name may be used as a seed, or may not, the legislature made the distinction by using the word "seed" as an adjective and excluded all imports of the article that were not imported as and intended to be used for seed.

As the word "seeds" is used in both clauses, it affords the inference that its first use was not intended to cover all things that contained the "principle of production," which is the broadest definition given of "seed," and that when an article has another name, as an apple, a banana, a potato, or a cone, although it might be the original source of production, it was not intended to be embraced in the word "seed." The word "vegetable," in the first clause quoted, is not used in its broadest sense, or it would include all the products of the vegetable kingdom. It, from the association in which it is found, clearly shows that it was intended to embrace the articles included in the word as it is commonly used, which is such portion of the vegetable kingdom as is cultivated for the table; or, as stated by Worcester, "vegetables, as the term is commonly used, are such plants as are cultivated for the table."

And he defines plant as "any vegetable production produced from seed." The word "vegetable," as used in the clauses quoted, clearly embraces not the leaves and the stem only, but the berry, the bean, the cucumber, the peach, and the apple, for it refers to such edibles as are intended to be embraced in the phrases and words "a state of nature," or "in salt" or "brine," or "prepared or preserved."

We contend that the word "vegetable" is used in the common acceptation, and includes such vegetables as are

cultivated for the table. If the very same vegetable is used exceptionally and in comparatively small quantities as a seed, but generally as an edible, such exceptional use does not affect the general rule. The common language of the people makes the distinction by using the word seed as an adjective, and the name of the vegetable with it as a noun, where the main use is as an edible and the exceptional use as a seed, when the latter is intended to be described—as seed wheat, seed rye, seed buckwheat, seed beans, seed potatoes, seed cucumbers, etc. It was proven that, of the beans produced and imported, from 97½ to 99 per cent. are used as an edible, and from 1 to 2½ per cent. as seed. (Rec., pp. 22, 24.)

On the trial, the defendant, as set forth in the second specification of error, offered to prove what was the common name applied to the import when used as an edible. This was rejected by the court.

As shown by the third specification of error, the court refused to charge that if the import (edible beans) was neither commercially nor commonly known as seeds, their verdict should be for defendant. As the protest, if sufficient (which is denied), specifically referred to the word "seeds" on the free list, this point should certainly have been affirmed; for the cause must turn, not upon what the defendant had adopted as the true classification, but rather on what the plaintiff alleged it to be in his protest. (*Davies* vs. *Arthur*, 96 U. S. R., 148.) For if neither commercially nor in common language the import was known as seeds, the court interpreting the statute should have defined the word either from its commercial or its common acceptation. It refused to do either.

If the import was not enumerated, then the defendant's second point should have been affirmed, which is:

> Also, that if the jury find that the imported articles are not designated or enumerated in the tariff act, and that they bear a similitude to vegetables, either in material, quality, texture, or the use to which they may be applied, then their verdict should be for the defendant; which request was denied or refused by the court, and to which ruling defendant's counsel duly excepted (Rec., p. 26).

Section 2499, Revised Statutes, declares:

> There shall be levied, collected, and paid, on each and every non-enumerated article which bears a similitude, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this title as chargeable with duty, the same rate of duty which is levied and charged on the enumerated article which it most resembles in any of the particulars before mentioned; and if any non-enumerated article equally resembles two or more enumerated articles, on which different rates of duty are chargeable, there shall be levied, collected, and paid, on such non-enumerated article, the same rate of duty as is chargeable on the article which it resembles paying the highest duty; and on all articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which at any of its component parts may be chargeable.

The imports involved in this case, in material, quality, *and use*, are more nearly similar to vegetables than to any other; but in any event it should have been submitted to the jury.

As shown in the seventh specification of error, the

court ruled that neither the commercial designation nor the name "bean" had anything to do with the question.

This seems to have closed almost every possible avenue of truth which had not before been excluded from consideration, from which the jury could have reached a legal result, and limited the possibility of reaching a lawful conclusion to the narrowest limits.

In addition to this, the court directed the attention of the jury to a false issue instead of the true one, in the following sentence of the charge (Rec., p. 26):

> This is the only question of fact—are they or are they not vegetables in the ordinary and usual definition of the word?

The protest, as interpreted by the evidence on the trial, showed the plaintiffs claimed the imports were seeds. The question for the jury to determine, as indicated in defendant's first point was, Were the imports seeds? and not, Were they vegetables?

G. A. JENKS,
Solicitor General.

United States Supreme Court.

WILLIAM H. ROBERTSON, Collector of the Port of New York,
Plaintiff in Error,

against

LOUIS A. SALOMON and CHARLES SALOMON,
Defendants in Error.

OCTOBER TERM, 1886.
No. 446.

BRIEF FOR DEFENDANTS IN ERROR.

JOSEPH H. CHOATE,
HENRY EDWIN TREMAIN,
MASON W. TYLER,
For Defendants in Error.

SUBJOYNE QUICK PRINTING CO., COR. WALKER AND CENTRE, N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1888. No. 446.

WILLIAM H. ROBERTSON, Collector of the Port of New York,
Plaintiff in Error,

AGAINST

LOUIS A. SALOMON and CHARLES SALOMON,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

Statement.

This cause was advanced for argument on motion by the Government as a representative suit satisfactorily presenting for final determination a controversy co-existent with the present tariff, respecting the exemption from duty, as in the Court below decided, of imported seeds of the field bean plant, which had originally been assessed with duty at twenty per cent. *ad valorem*.

Payments having been made under the usual protests, an action at law was instituted in the State Court, and after its removal by *certiorari* into the United States Circuit Court a jury trial was had, which terminated in a verdict for the importers. This result,

the defendants in error claim, could not properly have been otherwise in view of the incontrovertible testimony completely describing the merchandise, and of the statute applicable to the state of facts thus shown.

The phrase of the free list of 1883, under which the merchandise is claimed to be exempt from duty, reads: "Seeds *of all kinds*, except medicinal seeds, not specially enumerated or provided for in this act."

This phrase has received judicial interpretation by this Court in the case of *Ferry vs. Livingston*, 115 U. S., 542, where certain seeds which were found in fact not to be garden seeds were declared to be exempt from duty within its terms, while other seeds which were found in fact to be garden seeds, were held dutiable as such at twenty per cent. This decision necessarily followed the findings of fact upon which it was based, and eliminates from the present case any further consideration of the application of the words "except medicinal seeds," as found in the statute. It specially interprets them, however, as stated in Point I., and leaves for solution in the case at bar the single issue, whether the *particular seeds* in controversy are or are not elsewhere "specially enumerated or provided for" in the tariff of 1883. That the articles are "*seeds*" of *some* kind is incontestable. What particular *kind* of seeds they are, and whether otherwise enumerated, and if so, how and where, is the only residuary question. The use of the article is no factor in the case.

Seeds in great variety, and which are used in various ways, are mentioned in the schedules of the tariff of 1883. They are described sometimes by name, at other times according to their special adaptations, their general uses, their condition of manufacture, or according to some other characteristic feature distinguishing them for revenue purposes. These methods of classification are common to all tariffs, except that the changes in tariff language and terms successively correspond to the

modifications in rate classification or exemption intended by Congress to be effected. The clauses hitherto claimed by the Government to bear upon the present case are the following:

Schedule N. * * * "Garden seeds, except seed of the sugar-beet twenty per centum *ad valorem*" (Tariff Index, New Par., 465; U. S. St. at L., Vol. 22, p. 513); and Schedule G. * * * "Vegetables in their natural state, or in salt or brine not specially enumerated or provided for in this act, ten per centum *ad valorem*" (*Ib.*, Par. 286, *Ib.*, p. 504). The importers insisted that the merchandise was *not* "garden seeds." This fact, after a long controversy, was in 1885 conceded by the Treasury Department. Simultaneously it was officially discovered that instead of being *seeds*, as previously conceded, these importations were *vegetables*. Hence the actual distinction between a *vegetable* and the *seed* of a vegetable has become a matter for judicial determination.

As stated by the Court in its charge to the jury, "the Collector levied a duty of twenty per cent. as garden seeds. That rate of duty was paid under protest, the plaintiff insisting that the article was duty free as seeds not otherwise provided for, and *if not seeds* they were dutiable at ten per cent. The Treasury Department has receded from its position that the articles were garden seeds, and has directed a refund of ten per cent. so that the only question before you is whether they should have been admitted duty free as seeds, or should have paid a duty of ten per cent. as vegetables. White beans are unquestionably the seeds of the field bean," etc., etc., etc.

It was, nevertheless, then left by the Judge as "the only question of fact" (?) for the jury to determine, whether the merchandise *was* "seeds" or "vegetables" (Rec., fols. 65, 66).

In the course of the testimony there was no contra-

diction of the proposition that "vegetables are the edible roots and tops of plants as distinguished from their dried matured seeds" (Rec., fol. 27). This, indeed, is common knowledge. So is the fact without contradiction that the plaintiffs' importations were "the seed of the plant from the field bean" (fol. 27). As commercial commodities, also, vegetables are distinguished from seeds. Some of the staple seeds dealt in as commercial commodities are flax-seed, hemp-seed, rape-seed, lentils, clover-seed, mustard-seed, anise-seed, coriander-seed, quince-seed, and a great many more, all used for various purposes; while patatoes, onions, cabbage, cauliflower, beets, carrots, and other similar commodities illustrate the vegetables of commerce (fols. 26, 30). So the green bean, containing the immatured seed, not, however, in the same state as the plaintiffs' imported beans, is distinguished, like the string bean, from the *seed* itself. "The term 'seed' has no special signification in trade" (fol. 28). It is a general or popular term. "Different seeds have different uses, manufacturing and other uses" (Rec., p. 13); "and others are edible, *e. g.*, lentils, barley, wheat, rye, beans, oats, cotton-seed, coriander-seed," etc. (pp. 11–13).

The theory that no commodity is a seed except its use is exclusively for propagation is thus destroyed by common knowledge, as well as by commercial experience. Moreover, "the propagating elements are still there" (in plaintiffs' articles, fols. 42, 38 and 58). The term "seeds" being a general one, is inadequate to identify an individual commodity, and therefore is in trade very seldom used; a more particular description by name or purpose being requisite for mercantile designation (fol. 29). A seed is "a product of a plant by which that plant is propagated. A seed, when it is of certain plants, is largely used for food as well as propagation, and in that condition a seed is an article of commerce for both purposes. * * * When speaking of the commercial

name of this article being *beans*, that is a general term that describes all seeds of the bean plant, and it is so accepted in commerce, I should think," says one witness (fol. 48). Particular beans have particular names (fols. 47–48, and see Appendix). Some seeds are used for propagation as well as for other purposes, "as, for instance, beans, pease, corn, to some extent, wheat, and pease of various kinds used for the purposes of food and manufacturing," said the chief witness for the defense (fol. 53). He was confirmed by the next witness, who declared that there was no special signification in trade of the term seeds that differed from its ordinary acceptation of anything from which a plant can be grown (fol. 56).

Then in disposing of the discarded government theory that the seeds in question were garden seeds, witnesses on both sides (fols. 43, 44, 45, 49 and 56) agreed in describing the methods of cultivation in this country and in Europe. It was not the fact that beans like these were raised in gardens to be used otherwise "than in the green state, because they require more room;" * * * "one could not raise enough of them in that way to make it an object" (fol. 57). As commodities they are otherwise produced. They are grown in large fields where the ground is prepared for them, as it is for corn. They are raised in hills or drills, the bushes growing 1½ to 2 feet high, producing when matured a flower, which forms a pod, and in the pods are the bean. They are ripened in the sun, pulled off by hand or machine, dried, threshed, screened, picked over, assorted, and then sent to market; or in Hungary, collected by merchants of the villagers. In New York State this field cultivation is very extensive (fol. 46).

There being shown no difference between the commercial usage and common knowledge touching the actual distinctions characterizing vegetables and their seeds, an analytical chemist experienced also "in botany

and *in general merchandise*," stated the actual distinctions recognized the world over between vegetables and their seeds; explaining that edible plants contained from 80 to 90 per cent. of water, while seeds contain only from 9 per cent. to 13 per cent. of water. After explaining other actual distinctions recognized by standard authorities (see appendix hereto), he sums them up in stating that the mature seed is dried, and is a *different* product from the vegetable—the plant itself (fol. 36). "Seeds are the products of plants containing principally starchy matters, albuminoids, and from nine to thirteen per cent. of water" (fol. 34). The propagating elements are still in these seeds; which are dried, but not kiln dried; that might destroy the germ (fol. 38).

In the light of testimony of the foregoing character, the claim that these bean-seeds were classifiable as "garden seeds" necessarily disappeared.

In 1885, when receding from the erroneous garden seed classification, however, the Treasury Bureau again went astray. It completely reversed itself in the effort to escape the free list. It ceased to distinguish between the *seed* of the vegetable and the vegetable itself; and erroneously, as the importers insist, classified them together.

In March, 1884, however, the Secretary's order had truthfully declared "*beans of the kind or in the form of the article in consideration, as an article of commerce*, ARE NOT VEGETABLES. *They are the seeds of the bean-plant, which latter is a vegetable.*"

The same order further observed, "Beans are spoken of by that name in but three places in the Tariff Act (T. I., New, Para. 94, 636 and 808); not one of those paragraphs touches the article now in consideration. Paragraphs 94 and 636 speak of (beans not edible), while this article is edible. Paragraph 808 speaks specifically of Tonquin, Tonqua or Tonka beans, and they are not this article. These goods not being spoken of by

name in the Tariff Act they are not specifically enumerated or specifically provided for thereby."

The importers, therefore, insist that the articles are seeds (not medicinal) not specially enumerated or provided for in the schedules of dutiable merchandise.

From the foregoing statement will readily be deduced two inquiries: *First*, whether the merchandise, upon the undisputed and incontestable facts arising from its physical description is not of the class of seeds, and therefore free from duty as seeds not specially enumerated as subject to duty. *Second*, whether, after the Court had permitted this inquiry to be submitted to the jury, the conclusion to which the jury arrived should for any reason be disturbed.

Should the first inquiry be answered favorably to the defendants in error, the judgment will, of course, be affirmed.

In answering the second inquiry, it will be observed that the submission to the jury was indeed more favorable to the Collector than the testimony itself warranted; and that it left the jury to draw unjustifiable inferences which would abrogate the actual and common distinctions between vegetables and their seeds, and thus substitute instead of the actual distinctions as testified to, a meretricious distinction argumentatively assumed to exist in trade, but not sufficiently established to avail the defense under the principles of revenue administration as frequently expounded by this Court.

The defendants in error insist that either upon the undisputed facts, or under the submission as charged, assuming a wide contradiction of testimony (which there is not) the verdict should not be disturbed.

The single exception to the charge stating that the name by which "the article is called in trade and commerce has nothing to do with the question," should

be considered, if at all, in connection with the whole charge, and particularly with the paragraphs reading:

"It is conceded, and I charge you, that a term employed by Congress to designate an article as the subject of duty is to be understood in its *ordinary commercial sense*, rather than its technical or scientific meaning, *where they differ*.

I charge you furthermore, as requested by the plaintiff, that as various kinds of seeds are used for various purposes and have various names, the circumstances that these articles are edible and as a commodity are a staple article of food is not controlling.

Nor does the fact that the articles are known as beans or white beans or dried beans withdraw them from the classification of seeds, *if they are seeds;* and if you believe from the testimony that vegetables are the edible roots or tops of plants as distinguished from their dried, matured seeds, then your verdict will be for the plaintiff" (fols. 67–68).

Under this liberal submission to the jury, a verdict having been rendered for the plaintiffs, it is now submitted that the judgment is without error and should stand.

In so far as errors are assigned, the exceptions taken by the Government are discussed in the following:

POINTS.

I.

No controversy of Tariff Interpretation. The clause "seeds of all kinds except medicicinal" already interpreted.

In Ferry vs. Livingston, 115 U. S., 542, this Court adjudicated the meaning of the clause under which the

verdict in the case at bar was rendered. This interpretation coincides with the interpretation which it has uniformly received in Treasury Instructions.

This interpretation is that "THE PROPER READING" of the phrase in the free list "seeds of all kinds, except medicinal seeds not specially enumerated or provided for in this act" is that "*it includes seeds of all kinds (other than medicinal seeds) which are not specially enumerated or provided for in the act*" (*Ib.*, 549).

Seeds of many kinds *are* specially enumerated or provided for in the act, *e. g.*, garden seeds, aromatic seeds, seed of the sugar beet, and a variety of agricultural, medicinal, manufacturing, edible and other seeds. Thus the Treasury, as early as November 27, 1883, decided that certain cabbage and beet seeds which were *not* garden seeds came within the foregoing category of "seeds of all kinds except medicinal seeds not specially enumerated or provided for," and as such were exempt from duty (see Appendix A to this Brief, 6046, and 30 Int. Rev. Rec., 24). Of course, this instruction contemplated a possible dispute of *fact* as to whether any particular seed belonged to the category of garden seeds or not; but the construction of the statute accorded with that subsequently declared by this Court. It is noteworthy, however, that the Department in that order regarded "seeds such as barley, beans * * * clover, corn, * * * oats, onions, potatoes * * * rye, * * * wheat, *and other like products*," as belonging to the *category* of exempt *seeds* in the free list of 1883.

The case of *Ferry vs. Livingston*, this Court declares by the opinion, rested "for decision on the facts found" (it was tried by Court without jury), so that "it is not possible for this Court to lay down any general rule which will apply to cases differing in their *facts*" from that case.

As to the construction of the *law*, however, that is settled. There does not appear to have been any prac-

tical difficulty of administration in distinguishing imported "*garden* seeds" from the *field* seeds and other seeds; and the case at bar illustrates the actual termination, as well as the facility of future disposition, of any such possible controversy.

In regard to the proper interpretation and application of the statute concerning the classifications of various kinds of seeds there seems, therefore, to be no question of law between the importers now present and the Government.

"Seeds" they are under the importers' claim. As "seeds" they were originally classified and assessed by the Government. If seeds they *actually* are, then *Ferry vs. Livingston* indicates their exemption as seeds of a kind (*i. e.*, of the field-bean) not specially enumerated. Hence, in the case at bar, there is no issue respecting the statutory construction of the phrase "seeds of all kinds, except medicinal seeds, not specially enumerated or provided for in this act."

II.

Any possible issue of fact fairly settled by the verdict.

If, in any view of the case, an issue of *fact* may be justly inferred from the testimony, that issue has been settled. The verdict has determined that upon the testified description and physical exhibition of the merchandise it belongs to the class of "seeds" other than medicinal, and not to the class of "vegetables."

The testimony of plaintiffs' first witness, as stated at page 11 of Record, not only justifies this conclusion of

the jury, but is not found controverted or impaired by anything in the Record.

A produce merchant of extensive experience with "seeds" and "vegetables" as commercial commodities, distinguished the plaintiffs' merchandise when exhibited (Exhibits 1, 2 and 3) as "seeds" and *not* "vegetables," and showed the entire vegetable product (Exhibit No. 4), which was the green bean containing the germ within it, to be the "vegetable" itself, as distinguished from its "dried matured seeds" (Rec., page 11). Thus a fact of common knowledge was explained to be the truth in respect to commercial usage. While it is true that the exigencies of merchants sometimes result in peculiarities of trade usage which do *not* correspond with the common knowledge of the people, courts always require clear proofs of such peculiarities before taking them into account, else there would be no certainty in the law.

The evidence exhibiting a clear correspondence between common knowledge and trade usage, it was very liberal to defendant to leave the classification of the merchandise to the jury.

Hence for all legitimate purposes upon this writ of error the *fact* will be assumed as found by the jury that the imported merchandise was "seeds" and not "vegetables."

In behalf of the defendants in error here, it is respectfully insisted that this issue was very broadly and most favorably to the Government submitted by the Court to the jury.

The Court below charged, * * * "Are they or are they not vegetables in the ordinary and usual definition of the word. If they are—as white beans are undoubtedly used vastly more for purposes of food than of seeds—they are dutiable at 10 per cent. * * * The plaintiffs rely upon the uncontroverted fact that they are seeds. * * * If you believe from the testimony that vegetables are the edible roots or tops of

plants as distinguished from their dried matured seeds then your verdict will be for the plaintiff" (fols. 66-68).

What more upon the evidence could the collector fairly require from the Court? Lest this simple issue might not cover the entire law of the case, the Court, in response to the respective contentions during the trial, adopting substantially the explanatory propositions prayed for by both parties, further instructed the jury that: (1) A term employed by Congress to designate an article as the subject of duty is to be understood in its ordinary commercial sense rather than its technical or scientific meaning where they differ. (2) As various kinds of seeds are used for various purposes and have various names, the circumstances that these articles are edible and as a commodity are a staple article of food is not controlling. (3) As to the *name* "bean"—"the fact that the articles are known as beans, or white beans, or dried beans does not withdraw them from the classification of seeds if they are seeds. And *if you believe from the testimony* that vegetables are the edible roots or tops of plants, as distinguished from their dried matured seeds, then your verdict will be for the plaintiffs" (Rec., fols. 66–69).

These quotations suffice to indicate a charge covering all the law applicable to the issue submitted. No further instructions in aid of that issue appear by the record to have been sought for; while a more comprehensive and liberal submission—as far as the defense is concerned—can scarcely be imagined.

At all events, the instruction of the Court "was clear and accurate, and it *covered the entire ground of the controversy.* Nothing more was necessary to be said. No amount of verbiage would have improved it. The jury could have had no difficulty in applying it intelligently to the facts before them" (quoting from SWAYNE, J., in *Recknagle vs. Murphy, 102 U. S., p. 199*). To this the additional quotation is equally pertinent:

"It is needless to notice, specifically, the several assignments of error. They relate to the instructions given, and to several asked for, * * * and refused by the Court. As regards the former, we have expressed our approval. If the latter were in conflict with it, they were properly refused for that reason. Conceding that they were correct, the instruction given was sufficient for the case. Nothing more could, therefore, be required of the Court" (*Ib.*, 200).

It is, therefore, confidently submitted that the only possible issue of fact has been fairly and finally determined in the verdict.

III.

Tariff Descriptions—How Applied.

This is not a case where the descriptive phrases in the tariff can properly be subjected to the usages and demands of trade. The interpretation of "words of common speech" is "within the judicial knowledge, and, therefore, matter of law" (Marvel vs. Merritt, 116 U. S., 12). This rule is well settled, and its application illustrated in numerous adjudications.

The principle is thus stated by WAITE, Ch. J.: "While tariff acts are generally to be construed according to the commercial understanding of the terms employed language will be presumed to have the same meaning in commerce that it has in ordinary use, unless the contrary is shown" (Swan vs. Arthur, 103 U. S., 597); and by STRONG, J., in Greenleaf vs. Goodrich, 101 U. S., 284: "While it was true that where words of art or phrases are novel or obscure, as in terms of art, it was proper to explain them by reference to the art or precise science to which they were appropriate,

the rule was not so when the words or phrases were familiar to all classes, grades and occupations; and that the popular or received import of words furnished the general rule for the interpretation of public laws as well as of private transactions." "It must then, in any case, be shown that the Legislature designed a departure from the natural and popular acceptation of language" (citing Maillard vs. Lawrence, 16 How., 251). In the case at bar the contrary is shown; the trade meaning and popular import correspond (Rec., fols. 56, 54, 28, 29, 27). Tariff language is always understood to have the same meaning in commerce that it has in the community at large, unless the contrary is shown (Schmieder vs. Barney, 113 U. S., 645).

The only tariff words to be interpreted or applied in the case at bar are "seeds" and "vegetables."

The "novelty" or "obscurity" to the judicial mind of these terms will scarcely justify resort to mercantile witnesses. Trade usages will not identify them. They are common popular nouns, descriptive of a class, each member of which class is individualized by a particular name. Many *vegetables* and many *seeds* are thus particularized for tariff purposes. Those not in some way specially denominated fall among the residuum of their class, the non-enumerated vegetables by themselves at ten per cent., the non-enumerated *seeds* by themselves, free. Neither group falls within the classification of the other under any principle of fact or rule of law.

Common speech, dictionary meaning, scientific distinctions, natural philosophy, English philology, and the usage of commercial dealings, correspond with remarkable uniformity, in defining the words "seeds" and "vegetables."

Nor is this uniformity of definition disturbed because as the result of culinary art a New York boniface prints "beans" on his bill of fare! How such dishes are *known* was excluded under the Government's four

solemn exceptions (Rec., fols. 60 to 63), lest the answer might reveal culinary secrets, or provoke renewed Treasury "ambiguities." The answers of the restaurateur would afford the jury as accurate information on the point at issue as the *menu* of the French *chef* does the diner.

Yet the Government specifies (2) error because the the table names for "baked beans," or beans otherwise cooked, are not amplified by the testimony of caterers! The record shows (p. 24) that the Court had already permitted defendant to exhaust that line of possibility; and no authority is cited against the rulings assigned as error.

As distinguishing between two kinds of food we may speak of meat and vegetables, meaning the products respectively of animal or vegetable life; but even in this way the edible dried seeds would not in ordinary parlance be particularly distinguished. It would be the *plant* or its fruit, as the onion, potatoe, cauliflower, the entire bean or squash, or edible root or top itself.

"Vegetables" and "seeds" do not belong to a special vocabulary requiring mercantile definitions. The record in the case at bar is a presentation of that which is common knowledge. The term "*vegetable*" *describes something more than its seed.* A vegetable derives its existence and contains the power of propagating itself from its seed. The seed is not the vegetable. The seed is the rudiment of the plant. It is not the plant. The vegetable is not the seed. A child distinguishes between them. The Treasury Department fails to perceive the distinction. In its efforts to escape the free list it discovers "ambiguity" and appeals to this Court to relieve its embarrassment of administration.

Mr. Justice MATTHEWS says: "Where words are used in an act imposing duties upon imports, which have acquired by commercial use a meaning different from their ordinary meaning, the latter may be controlled by the former, if such be the apparent intent of the

statute. But the application fails * * * because the statute is unequivocal; there is no reference in the statute, either expressly or by implication, to any commercial usage, and *there is no language in it which requires* for its interpretation the aid of any extraneous circumstance" (Arthur vs. Morrison, 96 U. S., 108). The same Judge further declared, and in harmony with repeated adjudications in this Court: "The words used are not technical, either as having a special sense by commercial usage, nor as having a scientific meaning different from their popular meaning; they are the words of common speech, and as such the interpretation is within the judicial knowledge and, therefore, matter of law" (Marvel vs. Merritt, 116 U. S., 11).

In Lawrence vs. Merritt, 127 U. S., 113, the Judge below had charged the jury: "I do not think the words used in the statute have any technical meaning. You must take the statute as you find it, *and a common sense view of the case*, etc., etc., etc.; and this Court affirmed the charge.

IV.

Individual trade names inconsequential here.

Designation by terms of common description of commodities for tariff purposes is equally adequate with description by mercantile name. Congress selects the language it prefers; and neither the courts nor the Executive are at liberty to divert its obvious meaning. Moreover, the judiciary should encourage common language and common words, by not subjecting either to artificial restraints not in harmony with their natural import.

The reiteration in briefs and authorities of the accepted principle—sometimes, however, not carefully stated—that revenue laws are to be construed according to the commercial sense of the terms employed, where commercial terms are employed, has occasioned the mistaken contention that *all* tariff phrases are to be controlled according to the testimony of merchants. This is not so. The *principle is limited* to mercantile, or other *terms requiring* explanation. It has no application to words in our daily vocabulary which courts and juries are bound to understand. If it were otherwise, testimony that an article was *called* in trade by a name not mentioned in the tariff might enable a party to escape a classification under terms which otherwise aptly described his commodity.

The records of this Court exhibit some curious but unsuccessful contentions of this character, projected both for and against the Government. The case at bar affords one apt illustration.

The Government contends that because the seeds in question are distinguished *by name* as white beans, that they are not classifiable as *seeds*.

If the commodity in question had been described in the statute according to its individual name, such as, edible white beans, or more properly, "marrow beans," cleaned for food, or by some other particular name which in trade had become attached to it, there might be force in the contention. The controversy then would be to identify a special article with a special name. The trade usage about the statute-name would become a factor in the identification. But if the individual name not found in the statute is to exclude the commodity from one phrase of the statute otherwise apt to describe it, such a name may exclude it from other classifications; and thus may destroy the value of any method of enumeration Congress may adopt, or subject its careful schedules to no end of "ambiguities."

Therefore, in the case at bar, the Court properly in-

structed the jury that because the articles might be known in trade as beans, or white beans, or dried beans, that fact (fol. 68) did not "withdraw them from the classification of seeds, if they are seeds;" and we say the Court was right. Were it otherwise, timothy, clover, rye, lentils, wheat, linseed, flaxseed, and other like products might avoid an enumeration under the phrase of "seeds of all kinds" because every seed is distinguished by an individual name. If *name* prevailed over the noun describing the *class* then radish seed could not be dutiable as garden seed, because its known commercial name is radish seed, and it has not the *particular* designation of garden seed.

So cucumber seed has its individual name, and is *not* designated in trade garden seed; so asparagus seed is not *in trade* designated garden seed; so with celery seed, rhubarb seed, parsley seed, and other individual products. Each has its individual or particular trade name.

The existence of some special name has never been held to withdraw a commodity from the tariff class to which under terms of adequate description it otherwise belongs.

V.

Use of these seeds no factor. Origin and administration of the tariff clause under consideration.

As one error begets another so the effort to render the word "beans" the controlling factor for duty classification has occasioned the necessity of artificially restricting the word seeds to seeds which are exclusively used for propagation. The attempt to sustain

this restriction by the testimony of seedsmen utterly failed when the witness called for that purpose identified edible beans like those in question as the seeds he sold; adding that the *use* of the seed sold was not inquired about; and that "the term seed did not mean anything peculiar and different in trade than it does out of the trade" (Rec., fol. 54).

Nor does the use of the seed affect its classification. When the tariff classifies seeds or any other commodity according to its use it says so.

The following instances illustrate:

Illustrations of Tariff Classifications Dependent upon the Use of the Imported Article.

Thus:

Sparterre for making or ornamenting hats—free. Braids, tissues, laces, trimmings for making or ornamenting hats, bonnets or hoods, twenty per cent.

Woods for the manufacture of paper, gunny bags, etc., fit only for re-manufacturing—free. Types old, and fit *only* to be remanufactured—free. Sticks and canes * * * suitable for umbrellas, etc. (indicating a *general* use as distinguished from an *exclusive* use, which is not uncommon in tariff phraseology)—free.

Glass plate or disks unwrought for use in the manufacture of optical instruments—free.

Grasses and pulp of, for the manufacture of paper—free.

Dyeing or tanning articles in a crude state USED in dyeing or tanning, etc.—free.

Cat-gut strings or gut cord for musical instruments—free; while in another paragraph strings that are not for use in musical instruments are separately classified at 25 per cent.

Household effects, libraries, etc., not intended for sale, etc.—free.

Bamboo reeds * * * for canes, etc.—free.

Animals * * * for purposes of exhibition—free.

Acids used for medicinal, chemical or manufacturing purposes not specially enumerated, etc.—free.

Barks * * * *used* in the manufacture of quinia. Guano, manures and all substances *expressly used* for manure—free.

Bone dust and bone ash for manufacturing phosphate for fertilizers—free.

Osier or willow prepared for basket makers—free.

Gunpowder and all explosive substances used for mining blasting, artillery or sporting purposes, six and ten cents per pound.

Feathers * * * including birds *for millinery* ornaments, * * * and artificial flowers * * * for *millinery* use—fifty per cent.

Lastings, cut and fitted "for buttons *exclusively*" * * * ten per cent.

Sail duck, or canvas for sails, thirty per cent.

Acorns and dandelion root, raw and prepared, and all other articles *used* or *intended* to be used as coffee or as substitutes therefor—two cents per pound.

Hubs for wheels, twenty per cent. Needles for knitting or sewing machines, twenty-five per cent.

Iron and steel cotton ties or hoops for baling purposes, thirty-five per cent.

Iron in pigs, scrap iron, etc. * * * But nothing shall be deemed scrap iron, etc., or refuse iron or steel that has been in actual use and is fit only to be remanufactured. (Here an exclusive purpose or absence of purpose is the basis of classification).

Coloring for brandy, fifty per cent.

These and other instances illustrate tariff classifications hinging on the *use* of the taxed article; that use being in some instances an essential or exclusive use, and in other instances only a general use.

In every case where *use* is controlling it becomes so because of the language of the statute, and not otherwise.

Thus in the case at bar when "seeds" of all kinds, other than medicinal, and not elsewhere provided for, are mentioned in the free list, there is no justification in limiting the exempted "seeds" to seeds which are used for planting. The exempt seeds include, of course, those used for propagation, for manufacturing, for food of men or animals, for speculation, for science, art, or for any other purpose whatsoever. The exclusive limitation is that the "seeds of all kinds" thus exempted from duty is that seeds which are specially elsewhere more particularly described for tariff purposes, are to be classified under their more exact descriptions, and not under this residuary and generic provision for all the other "seeds."

In the case at bar the *use* is no factor in the classification. A seed is as much a seed when to be used to propagate as to manufacture, or to cook for food, or *for use as forage, or* in the arts, or for medicine.

It is noteworthy that the Tariff Act includes under the phrase "aromatic seeds" a description of seeds not used for propagation which indisputably indicates that the term "seeds" as used by it included both seeds used for propagation and seeds used for other purposes.

When, therefore, the Act says "seeds of all kinds * * * not specially enumerated or provided for" it must mean to include both "seeds used for propagation" and seeds used for other purposes.

Some of the embarrassments of classification under previous tariffs are described and their termination indicated in proceedings before the Tariff Commission which framed the phrase in the free list under which the verdict below was rendered.

It seems that under successive tariffs the classification of various kinds of seeds has from time to time been changed by Congress. At one time "garden seeds and seeds of all kinds" not specially enumerated were free. At later dates garden seeds were dutiable at one rate, specially described seeds at other rates, while some seeds were free. In the Revised Statutes of 1874 there were upwards of twenty-five different kinds of seeds specified by name and which were used for a variety of purposes, but the classification of a large number of non-enumerated seeds was in terms made dependent on their use "for agricultural and horticultural purposes." This, of course, did not describe seeds for cooking or for the arts or manufactures. To ascertain the use became a troublesome factor in administration, and thus the same commodity became often subjected to two rates of duty.

The present legislative phrase (seeds of all kinds except medicinal, etc.) was designed to avoid all such embarrassments, and is the fruition of the following suggestion in the testimony of Appraiser Sturgis: "Pease and beans belong generically to the order of seeds and should be classified under some one of the provisions for seeds; but they are, by a decision of the Department, subject to two rates of duty. (1) When they are intended to be consumed as food they are admitted as 'vegetables not otherwise provided for' (10 per cent.), and (2) when imported for use as seeds they are charged with the duty imposed upon agricultural or garden seeds (20 per cent.). Buckwheat belongs as much to the class of seeds as pease and beans, and is quite as much of a vegetable as either. * * * I would suggest that one rate of duty be placed upon *all seeds, except medicinal seeds.* The provisions for '*seeds* for agricultural purposes,' &c., as the phraseology of the law is, has led to the decisions of the Department which I have just referred to. It seems to me that *seeds,* excepting strictly medicinal seeds, irrespective of the 'purposes' for which they are imported, should be classified at one rate of duty." * * * (See ~~Appendix "A" to this Brief.~~)

See Report of Tariff Commission Vol. 1 p. 443

The tariff clause in consideration was not only framed but was administered in accordance with this advice and explanation until shortly before the trial of this action, when it was determined that *field* seeds were not *garden* seeds. Instead, however, of then exempting from duty these field-bean seeds, the Department assessed them at ten per cent., as if the language of the tariff of 1883 was the same as that of 1874, *i. e.*, dependent upon the *purpose* of the seed, and meanwhile proceeded to the trial of the present suit.

If not a pronounced evasion of existing law, this course was directly at variance with the previous opinions and rulings of the Treasury.

In March, 1884, Assistant-Secretary French announced in full (see Appendix hereto) Secretary Fol-

ger's "opinion upon the classification of seed beans." Speaking of beans, Secretary Folger says: "I infer that they are some variety of the seed of the bean plant or vegetable grown in gardens and fields, and intended for food, or for planting or sowing * * * These goods not being spoken of by name in the tariff act, they are not specifically enumerated or specifically provided for thereby. Are they affected by the tariff law by other language therein than that of specific mention? * * * That law speaks of *vegetables*. But beans of the kind or in the form of the article in consideration as an article of commerce, *are not vegetables*. They are the SEEDS OF THE BEAN PLANT, WHICH LATTER IS A VEGETABLE. So paragraphs 286 (the one now contended for by the Government here), 287, and 636, where mention is made of vegetables, do not apply. AS THESE BEANS ARE SEEDS, what does the tariff law say of seeds?" * * * Then follows a discussion of the distinctions possible between garden seeds and field seeds, in which it is conceded that "it is not easy, therefore, to say of any importation on general principles that it is of garden seeds or of field seeds; nor to frame a rule, on general principles and general knowledge, which will always exactly apply. * * * We know that in fact the bean, as a *seed* of the bean-plant or vegetable, is planted in the garden, and is largely planted in the field also. In the former case generally to be eaten green in the pod, as a green esculent, though sometimes as with Lima beans, in the form of the seed of the plant. In the latter case, for the production of seed for subsequent planting, and for food in the form of matured seed."

The *use* of this seed of the bean-plant was correctly esteemed no factor in its classification which was conceded to be as a *seed*.

So under the proofs in the case at bar, neither the use nor the name of the seed withdraws it from its classification as "seeds."

Another illustration of this interpretation occurs in the Treasury order deciding in October, 1884, that "lentil seeds" are free (see Appendix C hereto).

These articles (identical for tariff purposes with the merchandise in the case at bar) are "the seeds of the lentil plants and they are not garden seeds, not being sown in gardens, but *are field seeds, and so fall into the classification* in the provision in paragraph 760 for seeds of all kinds not otherwise provided for, which *are free of duty*. That they are seeds, and not vegetables, is shown by decision 6273, regarding duty on beans and pease, which states that beans of the kind or in the form of the article then under consideration, as an article of commerce, are not vegetables, but they are the seeds of the bean plant, which latter is a vegetable. *Whether seeds of the character in question are intended for use as an article of food or for planting purposes does not control the question of their classification.* They are still to be classed as seeds regardless of the purposes for which intended. * * * The Department decides that lentil seeds are free of duty under paragraph 760."

Thus it will be seen that from a classification free of duty in November, 1883 (as confirmed by the verdict in the case at bar) the Treasury Department without the intervention of Congress assessed in 1884 twenty per cent. on the merchandise represented in this controversy, and the next year still without legislation, the Secretary changed the rate again to ten per cent., instead of ordering exemption as first decided, November 27, 1883.

If, as decided by this Court, in Hartranft vs. Wiegmann (121 U. S., 609), duties are not to be assessed on doubtful interpretations, it would seem to be in order to condemn the Treasury legislation, and to order the Department to observe a straightforward administration of the free list prescribed by Congress; and thus

aid the administration in avoiding a "condition" and *applying* a "theory."

Why should the simple terms in the free list be abrogated by the careless pen of a secretary?

VI.

But as matter of law the evidence showed the merchandise was exempt from duty.

Upon the undisputed facts exhibited from this record, the tariff classification of the merchandise in question is to be determined as matter of law.

There is no issue or controversy or exception in the case over a sufficient description of the merchandise to establish its classification for revenue purposes.

As matter of law the seeds of the field-bean-plant are free; and the judgment to that effect is correct, regardless of the terms or methods of submitting the case to the jury. The instruction should have been to the jury to find a verdict for the plaintiffs, because there was enough uncontroverted evidence to warrant that course, and no testimony to indicate any other legal possibility. No evidence was offered or excluded which could in any way disturb the primary facts on which the classification depended.

Even under the liberality of the submission by the Court, the verdict may be treated here as a verdict ordered by the Court upon such evidence as was not in any respect controverted. Against the leading facts as shown which entitled plaintiffs to a verdict, there was nothing offered by the defendant to impair the plaintiffs' absolute right to a recovery. Hence, as matter of law the verdict and judgment should stand.

Commodities confessedly seeds of the bean plant assessed by the Government as seeds of the *garden* bean plant, and shown by uncontroverted testimony to be seeds of the *field* bean plant, cannot lawfully be withheld from classification as "seeds" by assigning some artificial meaning to the term seeds, or by denominating as a vegetable that which is the *seed* of a vegetable.

If every ruling specified for error had been made as claimed by the collector, the result would not disturb the illegality of the duty exacted and the plaintiffs' right to a *verdict upon the facts*, undisputed and not sought to be disputed.

In any aspect of the case, therefore, the judgment should be affirmed.

VII.

Clauses respecting non-enumerated articles of import inapplicable to the case at bar.

This is not a case where the commodities are to be assessed because of their possible similitude to some enumerated article, or where two rates of duty are equally applicable, because in the case at bar the articles are actually enumerated, being in truth seeds, and being found by the jury to be seeds. "Seeds of all kinds" other than medicinal not elsewhere provided for is a special enumeration of all such seeds as are not found more particularly mentioned elsewhere in the tariff. Articles thus comprehended *are* "enumerated." The tariff provisions applicable to articles *not* enumerated have no application to commodities comprehended within this described enumeration.

Until it shall be determined, therefore, that the commodities in question are not "seeds" of any kind, or that if they are seeds of *any* kind they are not elsewhere enumerated in the statute, there is no propriety in considering them as non-enumerated. The aim of the statute is to classify articles of the description mentioned, and to subject according to that description to the particular exemption or tax thus imposed. When the commodity corresponds to any such specification (which may be a particular or a general specification) it becomes an *enumerated* article, and the provisions of the statute applicable only to non-enumerated articles have no application.

them

Were this otherwise, the simple *existence of any controversy* over the identity of a commodity with a revenue description would enable officers and courts to treat it as non-enumerated, and thus in practice to destroy classifications established by the tariff schedules.

So in the case at bar, the articles were either dutiable as vegetables or free as seeds. As the Court told the jury, "the only question before you is whether they should have been admitted duty free as seeds, or should have paid a duty of ten per cent. as vegetables" (Rec., fol. 65). Therefore, there was no propriety in resorting to tariff clauses or to phrases applicable exclusively to *non*-enumerated articles. To have complied with defendant's requests (fol. 64) in this regard would not only have confused the jury, and misled them from the actual issue, but would have been error. *The articles were enumerated* under one or other of the tariff clauses mentioned, and as was declared by this Court, in Hartranft vs. Langfeld (125 U. S., p. 128), and many prior cases, in such instances, the provisions as to non-enumerated articles do not apply.

Moreover, *upon the evidence in the case*, as exhibited in the record, the jury were not at liberty to find that the plaintiff's articles are *not* enumerated or provided for in the tariff acts by either the designation of "seeds,

garden seeds, or vegetables;" and instructions of tha character were for similar reasons properly refused.

As to the prayer that the articles might be found to be "commercially known as garden seeds," the propriety of its refusal is obvious. There was no testimony whatever to that effect. The impropriety of such a classification had been recognized by the defendant. No such claim had been made or evidence given to support it either to the judge or jury; and the instruction of the Court that "The Treasury Department has receded from its position that the articles were garden seeds, and has directed a refund of ten per cent., so that the only question before you is whether they should be admitted duty free as seeds or should have paid a duty at ten per cent. as vegetables" *was not excepted to.* This statement and the record of the issue are conclusive.

Given a current exaction of ten per cent. duty as vegetables, a judicial determination that the articles are free, and the avowed embarrassments in administration requiring the advance on the docket of this particular issue (as stated in the Attorney-General's motion papers to be "to facilitate the administration of the Customs Revenue by an early authoritative construction of the law"), the defendants in error are justified from this record in asking this Court's rejection, if not in some instances a condemnation of the Solicitor-General's assignments of error.

VIII.

Further observations concerning the Government Brief.

Among the specifications of error is an exception to *receiving in evidence* (Rec., p. 24) the plaintiffs' pro-

tests because "the same were invalid and insufficient and did not set forth distinctly and specifically the grounds of plaintiffs' objection as required by Sec. 2931, U. S. R. S."

The objection was addressed exclusively to receiving the several protests in evidence; and not because they were unseasonable or did not adequately identify the importations or specify the exaction complained of. The collector's claim was that their *contents* were not sufficiently distinct and specific.

It would seem that *any seasonable protest* touching the importations in question was *competent evidence* for what it might prove in the end to be worth, and that the rejection from evidence of such a paper could not be sustained because of the subsequent application to it of some artificial rule that its contents fail to accomplish their apparent purpose. A properly executed instrument under which title is claimed will not be *excluded* from evidence in aid of such title simply because of its possible imperfections in describing the premises it purports to convey. There is no such principle of law. If connected with the issue and otherwise competent, it will be received in evidence; and its effect subsequently ascertained as the testimony and the law applicable to its contents may ultimately be developed.

Protests are not deeds, or dissertations or lawyer's briefs. They are commercial writings. They must intelligently indicate an importer's objection. They are to be read in connection with all the papers forming part of the transaction to which they relate; particularly when—as in the case at bar—they allude to them (*e. g.* Beans, Str. "Golden Horn," date of entry March 21, 1884, entry No. 37,951). Reference to that entry, invoice, bill of lading, permit, affidavits, and other requisite custom house assessment papers plainly indicates the transaction. This transaction was that the merchandise had been assessed in this instance at

twenty per cent., and that the importer paid the "illegal exactions" under coercion to get the goods and claimed a refund.

The importers' grounds were that the "said merchandise should be admitted free of duty, and if not free should not be charged with duty at a rate greater than ten per cent."

The collector and his superiors understood this sufficiently to acknowledge the latter alternative of the claim and to refund one-half of the twenty per cent. exacted.

But the Government now asks this Court to declare that its officers were not adequately advised "distinctly and specifically" of the grounds of plaintiffs' fundamental objection!

The importer claimed his merchandise was exempt from duty. This was the distinct and specific ground of his objection. He was not obliged to add a brief of the law to sustain him, nor to outline the facts he would prove and did prove before a jury. The collector as well as importer was bound to know the law, and as to the facts, the collector had possession of the goods, and presumptively again, knew their character better than plaintiffs, who as yet had only their shipping papers to inform them.

Practically, the importers may thus be entirely misinformed as to their goods; but until seeing them they are in no such situation as the collector, with respect to actual knowledge of the character of the merchandise. These commercial custom house papers must be treated in the light of the situations of the parties (which are unequal) and the transaction as it occurred.

With the collector and his deputies peering into the packages, the appraisers' written report of them, the shippers' statement, and the importers' claim before him, it would seem idle to argue that in truth the collector was not exactly acquainted with all facts the

importer could communicate, much less that the collector was misled.

So that in law and in fact the importer's protest brought distinct and sufficient specification.

Had the importers ventured to *cite* the law and cited it inaccurately, or entered upon the facts and stated them untruthfully, there would have been just cause for complaint. They did neither. They stated the proposition on which they did and would rely. They had only to give "*notice* of dissatisfication." It was no part of their protest to prove the validity of the "notice." If they should commence that task, they might as well be called upon to write all their arguments of law, points of fact, and names of witnesses to sustain them. The Collector would have importers furnish a trial brief.

In Davies vs. Arthur (96 U. S., p. 148), the importers stated the rate of duty which they claimed was lawful and stated it erroneously. Of course, that was not distinct and specific, and this Court so held. They claimed in protesting against a sixty per cent. rate that the lawful rate on the merchandise in question was thirty-five per cent., whereas the true rate was finally adjudicated to be fifty per cent., a rate not in the mind either of the importers or of the Government at the time of assessment and protest. Afterwards, when rebates were sought on the erroneous protests, the Government declined to refund the duties, and the Court held the protest to be erroneous and insufficient.

In the case at bar the plaintiffs' entire claim is expressed in the statement that the merchandise is free from duty; and to enter upon further detail is to give reasons, in support of this proposition. This the law would not require in the technical declaration of a plaintiff in a suit at law, much less is it the essence of a commercial notice.

Morever, this notice or protest is requisite under a

statute in limitation of the common law rights and is to be strictly construed.

It is respectfully submitted that there is no propriety in the exception regarding the protest. Besides, the Government in fact *did* understand and accept it, and act upon it by a decision (August 22, 1884, see Rec., fols. 11, 51, 65), and the collector was estopped at the trial from contesting its sufficiency.

Moreover, whether it fairly indicated the importer's claim under all the circumstances would seem to be under the most rigid rule *not* for the Court to determine by rejecting the paper *from evidence*, but to be for the *jury* to pass upon in the light of the actual transaction, and upon proofs of all the facts.

The statute has given to the Secretary of the Treasury (U. S. R. S., Sec. 3012½), power to refund duties which he is satisfied were illegally exacted, and the Courts should not restrict the exercise of this power to exclude refunds of excessive duties concededly illegal by the application of harsh, inequitable and unsound technicalities.

Whether a party has reasonably complied with the statute in respect to protesting is a question of fact, and the case must be of an extraordinary character to warrant its possible disposition as a question of law. In the case at bar the protest will be deemed sufficient under the evidence and the verdict.

IX.

No technicalities in protests. Notes of authorities.

In view of the contention in the Solicitor-General's brief urging an impropriety in the particular protest in

this case (which issue really serves no useful or equitable purpose) the following notes are presented of the authorities cited by plaintiff in error, and of some pertinent authorities not so cited.

The chief Circuit case apparently relied upon, *Frazee vs. Moffitt, 20 Blatchf., 207*, cited by the Government brief, scarcely justifies the position that a protest claiming merchandise to be exempt from any duty is insufficient.

In that case the protest upon an importation of hay was against a rate beyond ten per cent., because no higher rate "can lawfully or properly be charged on hay imported." The true duty was ultimately held to be only ten per cent. as a non-enumerated and unmanufactured article, *hay* not being specifically mentioned in the schedules. The Court observed that the asessment protested against had been made at twenty per cent., and that the only provision under which that was possible was Section 2516, which related to manufactured and unmanufactured articles not elsewhere specified, and made them dutiable at twenty and at ten per cent. respectively. The Court therefore said, that with the facts and law before him, "the Collector could not fail to understand from the protest that the rate of ten per cent. claimed in it to be the proper duty was the rate of ten per cent. named in Section 2516." So in the case at bar, there is but one free list section; and when goods are claimed to be exempt from duty the statute *is* specifically referred to. Mention of the section number would not be more perfect; but in the hay case even the section number was not given. "The Collector having acted under Section 2516 in imposing the twenty per cent., the language of the protest fairly referred the Collector to the ten per cent. clause of Section 2516," says the Court in the hay case.

So in the bean seed case, the Collector having acted upon the merchandise in his custody, and himself described and assessed it as seeds, "could not fail to understand from the protest" that he was to look at the free list, and there read that all kinds of seeds not elsewhere mentioned were exempt from any duty. "A protest is a commercial document usually made in the

hurry of business, entitled to a liberal interpretation, and not requiring technical precision, while at the same time it must show fairly that the objection afterwards made at the trial was in the mind of the party and was brought to the knowledge of the Collector, so as to secure to the Government the practical advantage which the statute was designed to secure" (Frazee vs. Moffitt). In the case at bar the Government shortly before this protest (see Appendix B hereto) had notified the Collector about the controversy over the seeds of beans and peas. It had just then elaborately considered *beans* as seeds, and after so declaring them, had concluded they were, the *seeds*, *not* free, because they were garden *seeds*, as distinguished from other kinds of seeds, and were provided for as such at twenty per cent. Nobody connected with the transaction giving rise to the case at bar could fail to derive the "practical advantage" of appreciating the importers' claim that subsequently prevailed in the verdict.

The Frazee case cites (p. 270) other cases where it was "expressly held that the statute was complied with although the protest did not designate the particular schedule and name under which the importation should be ranked."

No case, it is believed, can be cited where, upon a claim that the merchandise was exempt from duty, it was held necessary to quote from the free list. Such a rule would negative the commercial nature of a protest, and render it in most cases a weapon valueless if not ultimately fatal to the party employing it in his defense.

That a protest may make a double claim to the effect, as here, that if the goods are not free they are not dutiable beyond a stated rate instead of a still higher rate which had been assessed upon them, will scarcely be denied. In *Herman vs. Miller*, decided by this Court in *127 U. S., 363*, the protest claimed that if the goods were not liable to *one* rate they were liable only to an-

other rate, which was indicated in the protest; and the adequacy of the protest was affirmed.

In *Arthur vs. Dodge, 101 U. S., 34*, WAITE, Ch. J., said: "'Technical precision,' says Mr. Justice CLIFFORD, from the Court in Davies. vs. Arthur, is not required; but the objection must be so distinct and specific, as when fairly construed, to show that the objection taken at the trial was at the time in the mind of the importer, and that it was sufficient to notify the Collector of its true nature and character, to the end that he might *ascertain the precise facts* and have an opportunity to correct the mistake and cure the defect if it was one that could be obviated. We have had no difficulty in reaching the conclusion that the protest in this case fully meets the requirements of this rule. No one could have any doubt of the nature and character of the claim that was made."

So here the Collector knew the goods were *seeds*. He himself asserted that fact, and he knew the plaintiff claimed *such* seeds were free.

In *Arthur vs. Morgan, 112 U. S., 499*, this Court disposed of what the Solicitor General himself termed a "bare technicality," by affirming the protest as fairly showing "that the objection afterwards made at the trial was in the mind of the party, and was brought to the knowledge of the Collector, so as to secure to the Government the practical advantage which the statute was designed to secure;" and held the exemption claimed to be good, viz., to exempt a carriage when the protest claimed exemption for "personal effects" used by the passenger for "over a year." Nobody was misled.

So a protest against the payment of twenty-five per cent. duty charged on thread laces, claiming that the laces are liable to a duty of only twenty per cent., was *held sufficient* (Steegman vs. Maxwell, 3 Bl., 365). So *seeds* charged twenty per cent. and claimed to be *free* come exactly within this ruling, with the additional particularity of referring the Collector to the free list. So a protest against the *additional valuation found on*

appraisement and twenty per cent. penalty charged, claiming to enter the same according to the invoice and actual cost, is a sufficient protest without a specification as to how the appraisement was made to exceed the true value of the goods (*Lowenstein vs. Maxwell, 2 Bl., 401*).

In *Vaccari vs. Maxwell, 3 Bl., 373*, a protest in general terms was *held* "to be sufficiently distinct and specific to satisfy the Act of 1845 *by the aid* of the invoice," &c.

P. 374: "The protest is a mercantile and not a legal instrument, and when its meaning is unmistakably plain its phraseology will not be scrupulously criticised by the Courts (Swanston vs. Morton, 1 Curtis C. C., 294). We have always required that the Collector shall have by it direct and certain *notice of the grounds* of objection to the duties assessed, but it never has been determined as indispensable that *the entire notice must be incorporated in the protest*. The invoice and entry may ordinarily be regarded as connected, *with and comprising a part of, the protest*, being the things out of which the protest arises and to which it relates."

Of course, therefore, the merchandise in the defendant's custody and under his examination and appraiser's report is to be considered as labeled with the protest and with these Custom House papers.

In this trim, and with the Secretary's dissertation (of March, 1884, on seeds or beans) fresh from the official press, it seems desperate to urge actual ignorance of the meaning of this importers' notice. This is not an instance where Custom House ignorance will be judicially inferred.

In the Vaccari case, the Court proceeded to examine and consider the invoice, entry, oaths and protest, as connected with each other; and was "*bound to assume*" that the *invoice, entry and protest was before the Collector* when he fixed the duties; particularly where the legality of the practice then questioned had been a subject of consideration at the Custom House and in Court. The

Court said: "We think that the present protest, in conjunction with the other papers accompanying it, furnished to the Collector a sufficiently precise statement of the ground of objection," &c., &c.

In Chung Yune vs. Kelly, 14 Fed. R., 639, protest was against duties paid on sago flour, taxed as starch, the protest being that sago flour was free. Held, that plaintiff must recover, if at all, on the ground stated in the protest; therefore, if article not flour, he could not recover, even if the article was not dutiable.

So if we had claimed these articles to be sago flour and free as such, the proofs that they were free as seeds would not have helped us. Better way is to tell the Collector, as in effect we did, that the beans he assessed as *garden* seeds, are *not* such, but were seeds which were free;—nobody questioned that they were seeds, as by inspection they were.

In *Maillard vs. Lawrence, 3 Bl., 381*, it was said: "In view of the fact that the *Treasury Circular was in the hands of the defendant*, and was used by the officers as the rule governing their valuation of the goods, we think that the protest is to be regarded as an objection to that rule, and as an adequate compliance with the Act of February 26th, 1845, and that it set forth with all necessary distinctness the grounds of objection to the amount of duties assessed."

In fairness and in fact the "notice of dissatisfaction" lodged in the case at bar, did acquaint everybody concerned with the importers' claims; and the Government so responded in deciding upon it. The protest evincing such claim which was in fact lodged was not only adequate but was competent to be received in evidence.

X.

Conclusion.

In conclusion, it is therefore submitted, that it being beyond controversy that the importations in question are seeds of the field bean, and neither garden seeds nor the vegetable itself in any form, but simply its seed, the classification of the article for duty is established. A classification so fixed is not to be disturbed because the article is or is not edible or is commercially called beans or not called in trade a seed or is not used for planting.

Seeds is a common plural noun incapable of trade explanation to inform the judicial mind. Besides, it is testified to be "a general or popular term," and has no special trade signification. Common knowledge as to the distinction between vegetables and their seeds is, therefore, the narration of common facts of elementary knowledge in harmony with the judicial cognizance and trade usage. If there were not an harmonions unity of meaning in the use of the terms *vegetables* and *seeds*, both in trade, in science and in common speech, the case might be different. The attempt to fasten a factitious meaning to descriptive terms of common speech has been uniformly condemned. This Court will not permit tariff terms to be evaded by any such artifice. In this case the rule will not be varied because the Government seeks its relaxation. It is true in tariffs —as in contracts and deeds—that if words are novel, obscure or of an obvious commercial peculiarity requiring explanation before they can be comprehended by the public mind, testimony may be received to aid in the application of such words to objects of revenue. But such instances are rare, and must arise upon the face of the statute. Exceptional significations cannot be lawfully admitted to vary or to destroy the obvious

descriptions of a revenue statute. Congress uses terms in their natural sense; and when the terms are those of common speech this sense cannot be varied by any testimony. Else the law would be uncertain, unequal and of unjust discrimination in its operation.

Hence, commodities confessedly seeds of the bean, assessed by the Government as seeds of the garden bean, and shown by uncontradicted testimony to be seeds of the field bean, cannot, under the verdict and testimony of this case escape the classification of seeds by assigning some artificial meaning not found in the statute to the term "seeds."

The judgment should be affirmed.

JOSEPH H. CHOATE,
HENRY EDWIN TREMAIN,
MASON W. TYLER,
For the Defendants in Error.

APPENDIX A.

(6046). GARDEN SEEDS—PEASE, &c.

TREASURY DEPARTMENT, November 27, 1883.

SIR—The Department is in receipt of your letter of the 20th instant, submitting the appeal (1228i) of Messrs. Chase Brothers from your assessment of duty at the rate of 20 per cent. *ad valorem* on certain pease imported, per steamer "Norseman," from Canada.

You classified the merchandise at the rate of duty before specified under Schedule N, paragraph 465, of the Tariff Act of March 3, 1883, for garden seeds.

It seems to be conceded that the pease referred to were imported as seeds, and not for consumption as vegetables, and the question presented is whether they are garden seeds. The general and not the exceptional use must determine the classification of the article. *As a rule pease, beans and many other vegetable products are more largely sown in the field or farm than in the garden*, although some varieties may be specially adapted for garden planting.

It is held by the Department that all pease and beans imported for seed are entitled to free admission under the provision in the free list, paragraph 760, for seeds of all kinds not specially enumerated or provided for in that act.

You can readjust the entry accordingly, and cause your practice to conform to this ruling.

I may add, for your further information, that the Department regards seeds, such as barley, *beans*, beets, carrots, cabbage, clover, corn, cane, grass, mangel-wurzel, oats, onions, potatoes, pumpkins, rye, tobacco, turnip, wheat and other like products as belonging to the category of agricultural *seeds which are not garden seeds*, and that seeds of the artichoke, asparagus, borecole, Brussels sprouts, cauliflower, celery, cucumber, egg-plant, lettuce, leek, okra, parsley, pepper, rhubarb, radish, salsify and tomato belong to the category of garden seeds.

It is impossible to enumerate all the seeds which belong to either of these divisions in detail, and the above is given for information as to the principle upon which collectors of customs must act. Other cases will be disposed of as they arise.

Very respectfully,

H. F. FRENCH,
Acting Secretary.

Collector of Customs, Rochester, N. Y.

APPENDIX B.

(6273.) DUTIES ON BEANS AND PEASE.

TREASURY DEPARTMENT, March 28, 1884.

SIR—The Department duly received your letter of the 3d instant, submitting the appeals (4565i and 4566i) of Messrs. D. Landreth & Son from your assessment of duty at the rate of 20 per cent. *ad valorem* on certain beans imported per "Illinois," February 13, and "Vaderland," February 25, 1884.

Duties were assessed under paragraph 465 of the Tariff of March 3, 1883, which imposes a duty of 20 per cent. *ad valorem* on "garden seeds, except seed of the sugar beet."

The appellants claim that the merchandise is free of duty, under paragraph 760 of the free list, for seeds of all kinds, except medicinal seeds not specially enumerated or provided for in that act.

Reference is made in the papers to decision No. 6046 of November 27, 1883, in which it was stated that the Department regards seeds, such as pease and beans, and some others therein mentioned, as belonging to the category of agricultural seeds, which are not garden seeds.

The Secretary has deemed it proper to review the whole question in the light of the information now before the Department, and the following is his opinion upon the classification of seed beans, which are the subject of the present appeals:

The appellants brought in, by the steamship "Vaderland" a quantity of "*beans*." They made a like importation by the steamship "Illinois." There is no more specific description in the papers of the imported article than that given above, viz., "*beans*."

I infer that they are some variety of the seed of the bean plant or vegetable grown in gardens and fields, and intended for food, or for planting or sowing.

Beans are spoken of by that name in but three places in the Tariff Act: T. I., new, Pars. 94, 636, and 808. Not one of those paragraphs touches the article now in consideration. Paragraphs 94 and 636 speak of beans not edible, while this article is edible. Paragraph 808 speaks specifically of Tonquin, Tonqua or Tonka beans, and they are not this article.

These goods not being spoken of by name in the Tariff Act, they are not specifically enumerated or specifically provided for thereby.

Are they affected by the tariff law by other language therein than that of specific mention? Consider that, when framing the Tariff Act of 1883, Congress did, to some extent, provide in terms for beans by that name. In doing so, it made a distinction between those edible and those not edible, and admitted the latter free of duty. It is plain, then, that it had in mind beans edible, and beans not edible, and appreciated, and meant to state a distinction. When, then, it made an express provision for one kind by mention of it, does not the maxim apply *expressio unius, exclusio alterius?* Having, by express provision, suffered to come in free of duty the beans not edible, is not the inference strong that it did not mean to admit free of duty the beans edible, and that it meant to provide for them in some other part of the act.

That law speaks of *vegetables*. But beans of the kind, or in the form of the article in consideration, as an article of commerce, are not *vegetables*. They are the seeds of the bean plant, which latter is a vegetable. So paragraphs 286, 287 and 636, where mention is made of vegetables, do not apply.

As these beans are seeds, what does the Tariff Law say of seeds? Seeds are spoken of by that name in T. I., new, in five places: paragraphs 94, 636, 760, 761, 465. Paragraphs 94 and 636 do not apply to this article of seeds, for these are edible. Paragraphs 760 and 761 use words broad enough to take this article in, unless it is more particularly provided for in another part of the Tariff Act. If there is any other part that does so, it is paragraph 465, which says, "Garden seeds, except seed of the sugar-beet, twenty per centum ad valorem."

In common speech, garden-seeds are seeds used either for planting or sowing in the gardens adjacent to dwelling-houses, small spaces of land, and in the larger spaces of land called market-gardens, lying about cities or other large places of numerous and condensed population. The common notion of garden-seeds is this, that they are those seeds from which are raised, in the growing season of the year, the vegetable products which, before complete maturity, are used upon the table as part of the customary food of mankind, and in distinction from those seeds which, sowed or planted on a broader scale in the fields, produce the vegetables which are stored for winter use as food. Yet it is to be taken note of, that by extended field-culture there is produced much of the seed which finds its way to market and to sale as garden seeds in the common notion thereof above stated. It is not easy, therefore, to say of any importation, on general principles, that it is of garden-seeds or of field-seeds; nor to frame a rule, on general principles, and general knowledge, which will always exactly apply. We are constrained, therefore, to see if we can by interpretation get at the purpose of Congress, and if it did not intend to charge the phrase "garden-seeds," in paragraph 465, with an arbitrary meaning. It

has made an exception of the seed of one vegetable from the general expression "garden-seeds." It must have been thought by Congress that there was need of that exception, or that else the seed excepted would properly and necessarily be treated by the administrative officers of the Government as garden-seeds. It follows, then, that Congress thought that seeds like the seed of the sugar-beet were garden-seeds. We have then an idea of what kind of seeds Congress meant when it spoke the phrase "garden-seeds." Now, the sugar-beet is not a plant or a vegetable exclusively, nor mostly of the growth of gardens. It is, on the contrary, mostly the growth of the field or of the market-garden. If the sugar-beet is in the view of Congress a garden-plant, or vegetable, as well as, or in contact with, a field-plant, and its seed, garden-seed as well as, or in contrast with, field-seed, surely the bean is in legislative contemplation a garden-seed, or vegetable, *and the bean of the market, which is the seed of the bean-plant, is a garden-seed as well as, or rather than, a field-seed.* We know that, in fact, the bean, as a seed of the bean-plant, or vegetable, is planted in the garden, and is largely planted in the field also. In the former case, generally, to be eaten green in the pod, as a green esculent, though sometimes, as with Lima beans, in the form of the seed of the plant. In the latter case, for the production of seed for subsequent planting and for food in the form of the matured seed. It is to be noticed, too, that elsewhere in the act, when garden-seeds are mentioned, they are so in contrast or opposition to seeds which are not of the character of beans or other seeds used for sowing or planting both in field and garden. As in paragraph 94, where the phrase is "seeds, aromatic, not garden-seeds," and "seeds of morbid growth;" and so in paragraph 636 the seeds put in the free list are "seeds, aromatic, and seeds of morbid growth."

As the beans are garden seeds in some of the uses of them, and as it is to be got by interpretation that Congress meant to include such seeds as that of the bean in the phrase "garden seeds," in paragraph 465, the conclusion must be that the article under consideration is properly classified under paragraph 465 (T. I., new).

This ruling applies equally to pease, and the duty of 20 per cent. ad valorem will, therefore, be exacted on both, on entries of such merchandise.

Your decision assessing duty as aforesaid on the goods covered by said appeals is hereby affirmed.

Very Respectfully,

H. A. FRENCH,
Assistant Secretary.

Collector of Customs, Philadelphia, Pa.

APPENDIX C.

The seeds of the lentil plant are declared free of duty.

(6608). FREE ENTRY—LENTILS.

TREASURY DEPARTMENT, October 21, 1884.

SIR—The Department is in receipt of your letter of the 20th instant, in regard to the proper classification of lentils imported by Henry Eggers.

The question arose upon a difference of opinion between the naval office and your office. The naval officer held that the articles were not seeds, but were dutiable as vegetables, under paragraph 286, at 10 per cent. ad valorem. This view was based partly upon the fact that prior to the Act of March 3, 1883, such merchandise was classed as vegetables, and not as seeds, and also from the fact that these articles being edible they are excluded from the free list, because paragraph 636 excepts therefrom vegetables and seeds which are edible, and, that paragraph 760, for seeds of all kinds, except medicinal seeds not otherwise provided for, refers only to such articles as are intended to be replanted in this country.

Lentils as commonly imported are seeds of a vegetable. In the American Cyclopedia (Volume 10, page 79) lentils are described as an esculent seed of the pea family, and it is stated that the plant bears pods containing from one to four round, flattened, doubly convex seeds; that the cultivation of the lentils is very similar to that of the pea, requiring a dry, warm, sandy soil, and that it is sown early in May, broadcast, if intended merely for fodder, but in drills when the ripe seeds are desired.

The appraiser reports that the articles forming this importation are the seeds of the lentil plants, and that they are not garden-seeds, and not being generally sown in gardens, but are field seeds, and so fall into the classification in the provision in paragraph 760 for seeds of all kinds not otherwise provided for, which are free of duty. That they are seeds and not vegetables is shown by Decision 6273, regarding duty on beans and pease, which states that beans of the kind or in the form of the article then under consideration, as an article of commerce, are not vegetables, but they are the seeds of the bean plant, which latter is a vegetable. *Whether seeds of the character in question are intended for use as an article of food or for planting purposes does not control the question of their classification.*

They are still to be classed as seeds regardless of the purposes for which intended.

Paragraph 636 excepts these from edible seeds of the kind therein provided for, but so far as concerns seeds it only includes aromatic seeds and seeds of morbid growth, and lentil seeds are neither of these varieties, and so are not affected by that paragraph.

The Department decides that lentil seeds are free of duty under Paragraph 760.

You will take action accordingly.

Very Respectfully,

H. F. FRENCH,
Assistant Secretary.

Collector of Customs, New York.

APPENDIX D.

Webster's Dictionary defines "bean" as "a well-known leguminous plant and its seed of many varieties, the principal species being the *faba vulgaris*."

The third volume of Encyclopedia Brittanica (1876), page 398, thus defines "bean":

"The *seed* of certain leguminous plants cultivated for food all over the world and furnished chiefly by the genera Faba, Phaceolus, Dolichos, Cajanus and Laja. The common bean in all its varieties as cultivated in Britain and on the Continents of Europe and America is the product of the Faba Vulgaris. The French bean kidney or Haricot is the *seed* of the Phaseolus Vulgaris, but in India several other species of this genus of plants are raised and form no small portion of the diet of the inhabitants. From the genus Dolichos again the natives of India and South America procure beans or pulse of no small importance as articles of diet, such as the D. Ensiformis or sword bean of India, the Lima bean, &c. *Besides these there are numerous other pulses cultivated for the food* both of man and domestic animals, to which the name beans is frequently given. The common bean is even more nutritious than wheat, and contains a very high proportion of nitrogenous matter under the

form of legumen, which amounts on an average to 74 per cent. It is, however, a *rather coarse food* and difficult of digestion, and is chiefly used to feed horses, for which it is admirably adapted. In England French beans are chiefly, almost exclusively, used in the green state. The whole food being eaten as a table vegetable or prepared as a pickle. It is wholesome and nutritious, and in Holland and Germany the pods are preserved in salt by almost every family for winter and spring use. The green pods are cut across obliquely, most generally by a machine invented for the purpose, and salted in barrels. When wanted for use they are steeped in fresh water to remove the salt and broiled or stewed."

The second volume of Appleton's Cyclopedia (1873), page 416, thus defines "bean."

"Beans, the *seed* of leguminous plants of three Genera Faba Phaseolus, and Dolichos of which the Faba Vulgaris furnishes the different varieties of the common bean, cultivated for food throughout the world. It originated in the east and is said to be still found wild in Persia, and has been known and cultivated in all ages. The French kidney bean (Haricot) is the *seed* of the Phaseolus Vulgaris, and in India and South America species of Dolichos are raised such as the sword bean of India (D. Ensiformis and the Lima bean, the latter extensively cultivated in the United States), and furnish an important item of food, &c.

The garden and field beans brought to market here have a variety of names among which the Lima, Windsor, Dwarf and kidney are favorites."

These are all seeds.

"The Home and Farm Manual," page 963, 1884:

The varieties of beans are innumerable, the sorts in greatest request for their green pods being colored, while those used for their dried *seeds* as food being the white varieties. The pea (Navy) bean, the marrow bean and the Lima bean are carried to all parts of the civilized world and are considered indispensable to armies, navies and mariners generally. They are both exceedingly rich in flesh looking material, such as starch, gum, gluten and deficient in oil.

Extract of the Report of the Department of Agriculture for 1865, p. to p. 419.—The next *seeds* in the economy of the farm are the leguminous, which are less valuable for fattening purposes than any of the preceding, although they contain a larger proportion of nutritious matter than any of the cereals. The following table gives the composition of the different varieties as given by Braconnet and Einhof in Prof. Johnson's lectures on Agricultural Chemistry.

Constituents.	Pease.	Kidney Beans.	Field Beans.	Lentils dried.
Water	12.5	23.0	15.6	———
Husk	8.3	7.0	10.0	18.7
Legumen, Albumen, &c.	26.4	23.6	11.7	38.5
Starch	43.6	43.0	50.1	32.8
Sugar	2.0	0.2	2.2	3.1
Gum, &c.	4.0	1.5	6 0	6.0
Oil and Fat	1.2	0.7	———	———
Salts and Loss	2.0	1.0	4.4	0.9
	or economically:			
Water	12.5	23.0	15.6	———
Flesh Formers	26.4	23.6	11.7	38.5
Fat Formers	46.8	43.9	52.3	35.9
Accessories	12.3	8.5	16.0	24.7
Animal Matter	2.0	1.0	4.4	0.9

These analyses differ materially from those of the same *seeds* grown in this country, whether the difference is owing to the influences of soil or climate, I am, of course, unable to say. Probably both have their effect. The *seeds* in the following analyses were very dry and well-ripened:

Constituents.	Pease.	Kidney Beans.	Field Beans.	Lentils dried.
Water	14.2	15.0	14.9	14.0
Casein	23.1	23.9	24.0	25.7
Starch	38.0	35.1	35.7	34.8
Sugar	2.0	2.1	2.0	2.1
Gum	8.7	8.5	8.7	6.9
Fat	1.3	2.1	2.0	2.0
Woody Fibre	9.8	9.8	9.5	12.5
Mineral Matter	2.0	3.5	3.2	2.0
	or economically:			
Water	14.2	15.0	14.9	14.0
Flesh Formers	23.1	23.9	24.0	25.7
Fat Formers	41.9	39.3	39.7	38.9
Accessories	18.5	18.3	18.2	18.6
Mineral Matter	2.3	3.5	3.2	2.8

The Casein in the last analysis corresponds in nature to the legumen in the others.

Patent Office Reports: The topic of field beans will be found discussed officially in Patent Office Reports for 1854, page 336, where the recognized varieties are stated (*Ibid.*, 1859, pp. 317, 318), and in Encyclopedia Britannica, Ninth Edition, page 335. See also "Farm-

ing for Profit," published 1880 by J. C. McCurdy & Co., page 267; Report of Department of Agriculture for 1876, article on white beans as a field crop. In the Report of Department of Agriculture for 1862 white beans are regarded as a grain.

"Seeds" in the Tariff.

The following are illustrations of various places in the existing tariff where seeds are alluded to: Schedule N mentions hemp seed, rape seed and other oil seeds of like character; nuts, farina, arrowroot, coffee, anise, chamomile. In referring to seed oils other various seeds are thus indirectly mentioned, viz., fennel, juniper, mace, poppy, rosemary, thyme. Other mention is of flaxseed, mustard seed, acorns, rice, corn, barley, wheat, etc., etc., etc.

The foregoing instances of enumeration indicate that seeds for a variety of purposes and in a variety of ways and at a variety of rates are alluded to, specially enumerated or classified in the tariff; and that articles which are the direct product of seeds, such as cornmeal, oatmeal, rye flour, wheat flour, rice flour, etc., are distinguished by name from the seeds of which they are the product; and that many articles which are the direct products of seeds, and which represent the entire plant comprising such product, are specially mentioned in the tariff, such as hay, hops, etc.

Thus, official literature, tariff classification and the recognized authorities of general knowledge concur in the distinctions made in the case at bar between field seeds and garden seeds, and between all seeds and the plants or part of the plant capable of being produced from seeds, and that seeds have many names and many uses.